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The Process and Side-Effects of Harmonisation of European Welfare States

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Abstract
This paper describes the ways in which EU law forces Member States to reorganise their welfare states, focusing on the effects of free movement and competition principles on health care, education, and social insurance. It then considers the consequences of such reorganisations for national identity and social cohesion, for domestic and foreign policy and European integration, and as the creation of a new welfare industry.

The thesis of the first part is this: that the negative harmonisation of welfare services via judicial application of free movement rules is potentially further reaching than often realised, and difficult to reverse. As a result of changes in welfare provision many services are now provided 'for remuneration'. Moreover, legal, policy, and philosophical factors make it difficult to create a wholesale exemption for welfare. On the other hand, positive harmonisation remains politically unpopular and difficult to achieve, and at more than a very abstract framework level would probably be economically and organisationally undesirable too. Hence Europe is moving towards a continent-wide market for welfare services.

The thesis of the second part, considering the consequences of such a development, is that this probably has far greater implications for national identity and social structure than it does for welfare itself. It is possible to achieve high quality universal welfare service provision in regulated markets, but the absence of the huge public or quasi-public institutions which are a part of European life will change the texture of society. This is potentially threatening to social cohesion, and also to the European sense of our place in the world, in which contrasts with the US, in which welfare states often play a role, are prominent. Any such changed sense of self could – indeed should – have wide-ranging effects on state behaviour, even extending to foreign policy. As well as this, the creation of a European market for welfare provides opportunities for deepening European integration and involving the EU in central aspects of individual life. Finally, welfare is potentially the world's largest industry. However strange it may be to see it that way, privatising provision in Europe may create actors who can and will become global, perhaps using their expertise to help build welfare states around the world.

* Lecturer in European Law, University of Groningen. g.t.davies@rug.nl. I am grateful to Professor Ted Marmor and Professor Mattias Kumm for their comments on an earlier draft of this paper, and to the participants in the NYU School of Law seminar where this was first presented for their feedback and thoughts. I am also grateful to Professor Paul Nihoul for inviting me in the spring of 2005 to the University of Louvain to speak at a seminar on the EU and Health Policy. This paper builds on thoughts first publicly formulated there, and expressed in Davies 'Welfare Services and the European State', in Nihoul and Simon *L'Europe et les soins de santé* (Larcier, 2005) at 369.

Contents

1. Introduction

Membership of the European Union affects national welfare states. It is the contention here that it tends to result in (often monopolistic) national welfare-providing institutions being replaced by a diversity of private providers in an increasingly European market for welfare services; education, health care, and the different forms of social insurance.

This process is much discussed, and is politically controversial. The European public's complicated and nervous relationship with foreigners and markets – let alone individual freedom and diversity - makes such a liberalisation an inevitable object of attack. The primary criticism is that market provision will undermine solidarity. It is the welfare state itself which is seen as the threatened institution and protection from life's ills as the object that citizens have to lose.

This paper largely ignores that debate. It is not concerned with the relative functional merits of private and public provision, or whether privatisation should occur. Instead it aims to document the extent of the changes occurring, and to ask what their significance may be beyond welfare. What are the side effects of harmonisation?

This focus arises from three perceptions. One is that EU law as it stands authorises a great deal more interference in welfare states than has yet occurred. The process is certainly underway, but the principles stated have a long way to go before they reach their limits.

The second perception is that the greatest impact of this may not be on levels of welfare, but on broader social structure. While it should be possible, in principle, to provide high levels of services and protection to the population via private providers in a carefully regulated market, this will change what it feels like to live in Europe. The welfare state there is huge, and dominant in the lives of citizens and in national politics. This is not just another policy that is being tinkered with, but the core of the modern European state that is being systematically dismantled.

Thirdly, it is striking to a lawyer in what an un-European way this process is occurring. In a continent that still believes in the planned society, and where deductive, centralised policy-making is the norm, and the government of judges has been taboo for several hundred years, suddenly one of the most important areas of policy is being apparently handed over to the courts, and litigants. It is not legislation that is harmonising welfare states, but principles developed reactively, inductively, and out of individual situations, by the Court of Justice. In Europe, such a central area of social planning and state structure has never before been led by judges. Moreover, those judges are not even applying welfare law. They are using principles of economic liberty and regulation. Welfare reform is not being led by welfare policy at all.

Putting these together is, more than anything else, surprising. The mood of angsty discontent in Europe, the constipated politics, suggest that nothing much is happening, and that this is the problem. Yet it is the suggestion here that quite a lot is happening, and more will be soon. There is some kind of great big un-European experiment with the state going on, and at the end of it the monolithic institutions developed after the second World War may be gone, and there will never have been any public decision to do this but it will have happened, and for better or for worse

there will be a new kind of order, in which it remains to be seen how strong or deep the social cohesion and national identities will be, and how governments and peoples will behave.

The first sections of the paper describe the law, and its application to welfare services. They are, it is hoped, utterly conventional and non-controversial, and yet they do suggest a scope for economic law somewhat wider than is generally seen to be the case. They take, however naively, the judgments of the Court to represent the law and simply follow these through. They find that pretty much all of the services provided by welfare states could, if organised in the right way, fall within free movement and competition law, and that the number of them so-organised is considerable and will grow.

Following this there is discussion of the stability of that law. Of course, in principle, the Court could change its mind, or the Member States could take legislative steps to remove welfare from the scope of EU law, or insulate it further from the effects. What are the difficulties involved in such a step? A consideration of these suggests that the law, despite its controversial status, may be difficult to fundamentally amend. An exclusion of welfare from principles of openness would both undermine the goals of the EU and create political and social tensions. Yet if welfare is to be open then the days of the dominant state provider are probably numbered; such institutions do not mix well with competition.

Having suggested that some form of welfare market is very likely, the paper moves onto consideration of the consequences of this, social, political and economic. Inevitably, the most that can be done in this limited paper is to outline ideas and possible paths. There is no attempt to prove an empirical thesis. The aim of these sections is rather to indicate how welfare change relates to broader issues, and what some of the possible reactions to it could be. For the lawyer and lawmaker, it is important to see the law in its context, and look beyond its immediate functional effects. For the non-lawyer, considering social and political changes, it is important to know what contribution the law may make.

Initially, the role of the welfare state in post-war identity and its importance to social cohesion are considered, before looking at possible institutional reactions to welfare fragmentation. How might the behaviour of the state, and of the EU, change in a European welfare market? Then, what does it mean for integration, and even for economic performance?

For the state, the major change is from provision to regulation. It is suggested that this requires a different type of engagement with welfare, less manpower intensive, and in some ways more distant. Some ideas are put forward for how this might affect the character of domestic politics. For example: If European governments were no longer so busy with the management of welfare, what would they turn their minds to; foreign affairs? Could private provision of welfare release the state from this essentially introspective policy area and encourage it to take a more extroverted role in the world? Is the difference between the US and the European role in global management partly explainable in terms of the capacity and obligation of their governments to keep themselves usefully busy with domestic matters?

The move from public provision to a regulated market also has implications for the EU itself and the integration process. It is the natural regulator of European markets, so an opening is provided

for EU involvement in this most politically important and sensitive of areas. Could this provide the path to the heart of the European citizen that has so long in vain been sought?

Finally, if the welfare state is often seen by Europeans as a source of social strength, then its weaknesses are increasingly economic. Could privatising welfare rewrite a story about over-expensive and bureaucratic public sectors as one about European dominance of what is potentially by far the world's largest industry?

The conclusion attempts, as they do, to bring all the above together and sketch a linking theme. The theme is that of opportunity arising from creative destruction. The dismantling of structures does not have to be the end of what they protect, but can be an opportunity to rebuild in a different way. Having rebuilt itself with remarkable success after its last great war, Europe also created social institutions and legal structures that would contain its own freedom; it tried to entrench its social-market democracies. Yet no people can contain itself for ever. The panic that Europe seems to be experiencing currently is partly a result of the awareness that it is in fact in control of its own destiny; that nothing forces it to be peaceful, tolerant, or redistributive. The fear is that released from the belief that constitutions and institutions guarantee this, the continent may lose its way and its soul. The opportunity arises because it may not; it may freely choose for the values that previously it believed were beyond question. The market may invite loss of solidarity, but the continent may choose not to let it go.

What is chosen is often more beautiful than what is imposed. The big motivating idea behind this paper is that European integration, entailing the removal of national boundaries and limitations, is essentially a process of self-discovery for Europe, with all the risks that this entails. This paper on welfare harmonisation is part of what I hope will become a broader investigation of this theme. If it seems to be an incomplete thesis, and to address issues of which welfare is but a part, that is indeed the case. The hope is merely that a coherently bounded and manageable aspect of Europe's greater self-exploration is described below.

Premise: that private provision need not be bad provision

One significant premise underlies the argument in this paper. It is that it is possible for private providers within a well-enough regulated market to provide good quality services, even in a sensitive area such as welfare. This is not a statement about the profit-motive or the relative moral status of private and public provision, but a narrowly functional point. Good healthcare, education and insurance can be provided to a population by institutions not owned by the state, but subject to regulation imposing certain obligations of equality and universality.

For some this will be controversial, yet is should be noted that many European states already provide much of their welfare in this way. The role of private institutions in health care is significant, and dominant in some states. Private universities are common, and in some countries most schools are also independent, non-state owned bodies. Social insurance is often provided by non-public funds, and is perhaps one of the easiest things to privatise, as a relatively impersonal transaction. Of course, it may well be necessary to regulate strictly and impose obligations concerning the terms of provision in order to ensure adequate and universal cover, but the mere fact of public or private ownership need not be crucial to effective delivery of the service itself.

Moreover, private provision does not remove the capacity of the state to tax and redistribute in order to ensure access to those services.

It is hoped that the premise, narrowly interpreted as above, and not as a broader political comment about the merits of private versus public, is acceptable, for it is central to the thesis of this paper. It is precisely the argument here that it is because private provision of welfare is functionally possible that it is difficult to prevent its expansion, and to stop the movement from public provision to private provision within a regulated and European market. Arguments that state monopolies are necessary for reasons of the quality of provision are not usually good arguments, and so will be difficult to sustain. Rather, the arguments for retaining state dominance are more subtle and complex, to do with identity and social cohesion, rather than the quality of the particular service in question. The major aim of this paper is to try and make those arguments explicit, to indicate how they might be evaluated – without taking a particular normative stance - and investigate how they might play a role in the future of the law.

Disclaimer: the limits of this paper

Describing a point of view without challenging it can often feel and read like endorsement. Writing this paper it often felt as if I was fighting in the corner of European patriots, free marketers, anti-Americans, and occasionally old-fashioned socialists. That is not my intention. This paper does not aim to judge Europe's self-image or its integration process. In particular it does not express a view on whether EU law should apply to welfare. It merely surveys the arguments and the consequences. I take no side in the normative debates.

I was also very aware of the risk of twisting differences of degree into differences of type. When contrasting markets and public welfare systems, and Europe and America, the temptation to over-simplify was there. I hope that I have managed to show the importance of the genuine differences to my argument, without slipping into polemic.

The risk was heightened because I was often writing about public perception – which is not always nuanced or fair. Yet without acknowledgment of the prejudices of the people, and the stereotypes which they use to build their world view, it is difficult to analyse what their reaction to the changing world around them will be. Once again, my aim is not to endorse, or to criticise, but to describe.

This limited ambition is the result of the complexity of the topic. The questions whether welfare provision should be privatised and liberalised, or whether it should be subject to EU law, involve many issues. One needs to consider how welfare is best delivered from the perspectives of efficiency and equality, upon which there is a vast public policy literature.[1] However, one also needs to consider the needs and importance of European integration, and whether this provides a

[1] An introduction to the issues can be found in e.g. Marmor *Fads in Medical Care Management and Policy* (Nuffield Trust, 2004); Ranade *Markets and Healthcare* (Addison Wesley Longman, 1998); Moschonos *Education and Training in the EU* (Ashgate, 1998); Johnson *The Welfare State in Transition – The Theory and Practice of Welfare Pluralism* (U Massachusetts Press, 1987). Robert Gorden University Centre for Public Policy and Management also runs an excellent and comprehensive website which includes discussion of policy issues relating to welfare and suggestions for further reading: www.2.rgu.ac.uk/publicpolicy/introduction/wstate.htm.

normative basis for harmonising welfare, or whether, contrarily, democratic or socio-cultural arguments justify not doing so. In the end, any conclusion depends on visions of Europe, of economics, of liberty and collectivity, of the nation, and on value judgments about the relative importance of these. It would be impossible to provide an argued conclusion on whether the process being described here is a good thing without arguing all of these aspects, which would be too much for one paper, perhaps for one lifetime. If I do have a normative position it is this: the question is too difficult to decide *a priori*. Free movement attracts me, as an enhancement of liberty, and as a reaction to nationalism, but it has risks. Let us proceed carefully in that direction and see if it makes us happier.

Definitions: the dangerous language of markets

This is an area where terminology carries much ideological baggage. A few words on some of the terms used may be useful. Firstly, when I speak of 'markets' I do not mean 'absolutely free markets'. I am simply referring to a state in which providers compete with each other to some extent, and have a financial interest in their activities, to some extent. This is not the same as saying that they make a profit as such. Many non-profit-making bodies are nevertheless institutionally benefited by increased income, and actively seek it, as readers working in universities will know. I am also not suggesting that in markets 'market forces' prevail absolutely or that goods are allocated entirely by such forces or by ability to pay. That may happen when markets are not regulated to any great extent. However, a market can be very highly regulated, and weaker consumers can be protected, and it can still be a market in the sense that I am using the word. Hence talk of markets does not indicate, as such, an abandonment of 'non-market' values. Whether such values are abandoned is a separable question, at least as a matter of logic, if arguably not as a matter of political reality, from whether a market exists.

Somewhat similarly, by 'liberalisation' I refer to an increase in freedom to engage in an activity. In the context of welfare, this means increasing the possibilities for new actors to engage in provision of services. Once again, that is not, contrary to its use in much political discourse, a comment on the terms on which such provision is permitted. It is simply a contrast with a situation where only one, or a selected few, bodies are permitted to provide.

When I refer to 'public' and 'private' I am on the whole using these words in their simplest possible way – referring to ownership by the state or by something or someone that is not the state. That is not to deny that lines are blurred, and that privately owned bodies can have values and behaviour that leads the public to view them as public (and vice versa). However, as with the other terms above, my aim to separate issues as much as possible and render debate transparent. Whether and when private and public bodies behave like each other is an interesting question which can only be clearly addressed if one begins by having a working definition of the difference between them. Similarly, whether private provision can ever be compatible with non-market values is a question that can only be explored if the question of behaviour is separated from that of ownership and structure. If 'markets', 'private' and 'liberalisation' are used as shorthand for 'unequal', 'exploitative', and 'abandonment of solidarity' then clear discussion even of any genuine causal link becomes impossible.

Of course, for those theoreticians for whom the former ideas entail the latter not just as a matter of socio-political fact but as a matter of necessary logic this will be unsatisfactory. Then I am engaging in linguistic dishonesty. However, they will not be interested in this paper. It was part of the premise above that any link between the two groups is not conceptually inherent. 'Market-based provision' does not *mean* 'abandonment of the poor'. That leaves open whether in the medium or long term a *de facto* causal relationship is politically inevitable, an issue touched on in the text below.

2. The Processes of Harmonisation

The term 'welfare' is used here to cover the core services that are associated with the European welfare state. It is often used in a narrower sense, to refer to last-resort benefits, but here the broader use is convenient. The focus is on provision of health care, provision of education, and social insurance. This latter is understood to mean insurance against unemployment, sickness, long-term incapacity, and old-age. The important element of these insurances is that for many it would be impossible, or prohibitively expensive, to obtain them on a truly free market because the individuals concern represent bad-risks; they are too healthy for pensions or too sick or stubborn for medical or unemployment insurance. Hence states have systems involving compulsory participation, acceptance obligations on insurers, and cross-subsidy between participants, or subsidy from general taxation, to make the insurance available to all.[2]

The view which is almost universally accepted in Europe is that in at least these three areas there should be universal availability of services and a high degree of equality; that the services that all individuals receive should be of the same standard, and ideally from the same institutions.[3] In particular, it is seen as a fundamental aim of the state to ensure that those who are poor receive the same education and healthcare and security against social ills as those who are wealthy. A contrast is often made between 'welfarist' and 'universalist' conceptions of public assistance. The first sees this as limited to helping those who cannot help themselves and so often relies on means-testing. The second provides services and benefits to the entire population, irrespective of their financial position. European welfare states tend towards universalism, certainly in the services under discussion here. There may be means-tested contribution towards the cost of health insurance and education, but this tends to be marginal, and means-linked institutional access is almost unknown: there are no universities, and very few schools or hospitals, which are only accessible to the rich, and none that only accept the poor.

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[2] Hatzopoulos 'Health Law and Policy: the Impact of the EU' in de Burca *EU Law and the Welfare State* (OUP, 2005) 111-119; Rice and Smith 'Strategic Resource Allocation and Funding Decisions' in Figueras, McKee, Mossialos and Saltman *Funding Health Care: Options for Europe* (Open University Press, 2002), at 250. For an excellent introduction to the policy and purpose of social insurance see Marmor and Mashaw 'Understanding Social Insurance: Fairness, Affordability, and the 'Modernization' of Social Security and Medicare'(2006) 25 Health Affairs 114, although note that privatisation is largely treated as entailing a transfer of risk to individuals, a position making sense within the context of the American reforms that the paper addresses, but not accepted in the text above.

[3] Hatzopoulos, ibid. Marcusson, Rossi, Engelmann, Martin, Knopf and Roscher 'Constructing Europe? The Evolution of Nation-State Identities' in Christiansen, Jorgensen and Wiener *The Social Construction of* Europe (Sage, 1999) at 101.

However, the systems for provision of these services vary widely.[4] Some countries educate almost all their children and students in public institutions following standard national curricula. Others, such as the Netherlands, operate what is essentially a voucher system without vouchers; private schools provide more than half the nation's school education and are reimbursed for each pupil at standard rates.[5] The National Health Service in the UK is famously said to be the world's third largest employer after the Indian railways and the Chinese army, and provides the overwhelming majority of the nation's medical services freely to those turning up on its doorstep.[6] In some other states medical care is provided almost entirely by private institutions, and the state achieves universality via regulation and intervention in medical insurance.[7] Even in social insurance, the sector where the state tends to be the most widely dominant, there are some quasi-private or truly private actors. Private pension funds are no longer strange to many countries, and industry-sector organisations are often responsible for other forms of social insurance.[8] These have a non-market character in the sense that they contain cross-subsidy and exist to serve their sector rather than any shareholders, but they are not formally public in character. Nevertheless, their goals and character mean that to their customers they seem like public institutions, and the state subsidy they often receive, often combined with state-like regulatory privileges granted them, justifies viewing them as state agents rather than autonomous private organs.[9]

However, what all the systems share is a profoundly national character. Most obviously, they are created by national law, and their institutional scope is determined by the geographical and jurisdictional limits of the Member State. Moreover, welfare is also national on more pre-legal levels. The fundamental unit within which equality is measured, and the political unit within with the success of welfare is measured, are both the nation. Similarly, the redistributive territory remains the state; Europe does not yet have the means, and while regions may have some redistributive function it is usually contained, less significant than that of the nation as a whole,

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[4] Esping-Andersen *The Three Worlds of Welfare Capitalism* (CUP, 1996); Bahle 'The Changing Institutionalisation of Social Services in England and Wales, France and Germany: Is the Welfare State on the Retreat?' (2003) Journal of European Social Policy 5; Kautto 'Investing in Services in Western European Welfare States' (2003) Journal of European Social Policy 53; Marcusson et al, ibid.

[5] Hofman, Hofman, Gray and Daly *The Institutional Context of Educational Systems in Europe: A Cross-Country Comparison on Quality and Equality* (Kluwer, 2004) provides an overview of European school systems. See also www.eurydice.org for further information on educational systems in Europe. On the Netherland system see Patrinos 'Private education provision and public finance. The Netherlands as a possible model' (2002) occasional paper no.59, National Center for the Study of Privatization in Education, Teacher's College, Columbia University, available at www.ncspe.org.

[6] The working of the NHS is explained on www.nhs.uk.

[7] Kemenade *Health Care in Europe 1997* (Elsevier, 1997) provides an overview of European systems.

[8] www.esip.org, the European Social Insurance Platform, contains a wide range of information on the organisation of social insurance in Member States. See also Normand and Busse 'Social Health Insurance Funding' in Figueras, McKee, Mossialos and Saltman *Funding Health Care: Options for Europe* (Open University Press, 2002), at 59;'Voluntary Health Insurance' in Mossialos and McKee *EU Law and the Social Character of Health Care* (Peter Lang, 2002).

[9] Case C-415/93 *Bosman* [1991] ECR I-4837; Opinion of the Advocate General in Case C-411/98 *Ferlini* [2000] ECR I-8081; C-266/87 *Royal Pharmaceutical Society* [1989] ECR I-1295; Temple Lang 'Privatisation of Social Welfare: European Union Competition Law Rules' in Dougan and Spaventa *Social Welfare and EU Law* (Hart Publishing, 2003) 45, at 74.

and indeed may be parasitic on this; regions may be distributing nationally collected funds, via central subsidy to local government.[10]

Another shared aspect is complexity. From the consumer perspective there may at times be simplicity. Indeed, the capacity of the citizen to know their welfare rights, what they may receive, and how to obtain it, is part of public attachment to national structures, the contrast being with the chaos of the market.[11] Still, simplicity is hard work, and front-end transparency rests on a superstructure of regulation commonly forming a significant part of the total law of the land, and an administrative and provisory apparatus that is typically the largest part of the state and consumes the majority of its budget.[12] Inevitably, in such a structure the parts of the machine are interlinked and interdependent, and tinkering with one small cog may have much wider repercussions.

Enter the EU. Of all its aims the one which has until now had the greatest impact on the lives of Europeans, and which is perhaps most closely tied to the ideological basis of integration, is that of removing the borders between Member States, and achieving an area of free movement.[13] A small bundle of ideas, primarily that private movement between states (of goods, persons, services and capital[14]) should not be obstructed by public bodies, that discrimination on the grounds of nationality should not occur,[15] and that the competition resulting from free movement should be fair,[16] have not only reshaped European economies and societies but also acquired a constitution-like moral and legal status.[17] Free movement and consequent fair treatment have become individual European rights.[18]

There are two mechanisms by which free movement can cause changes to occur in national welfare systems. They are conventionally called positive and negative harmonisation.[19] The first consists of the making of new rules concerning welfare at the EU level; replacement of national legislation by European. The second consists of the application of more general principles of EU

[10] Some details may be found in 'Limits of local taxation, financial equalisation, and methods for calculating general grants' Report no.65 in the Council of Europe series *Local and Regional Authorities in Europe*, (Council of Europe Publishing, 1998) available from www.coe.int.
[11] See Baldock 'On being a welfare consumer in a consumer society' (2003) 2 Social Policy and Society 65 at 67, and his derivation of a similar idea from Foucault.
[12] See part 8 'The Economic Consequences of Welfare Harmonisation', below, for details.
[13] Articles 2 and 14 EC.
[14] Articles 18, 28, 39, 43, 49 and 56 EC are the most important.
[15] Article 12 EC; ibid.
[16] Article 3 EC; Article 95 EC.
[17] Case 186/87 *Cowan* [1989] ECR 195; *Bickel and Franz* Case C-274/96 [1998] ECR I-7637; Case C-85/96 *Martinez Sala* [1998] ECR I-2691; Case C-459/99 *MRAX* [2002] ECR I-6591; Case C-148/02 *Garcia Avello* [2003] ECR I-1163; Case C-112/00 *Schmidberger* [2003] ECR I5659; Case C-209/03 *Bidar* [2005] ECR I-2119.
[18] Reich 'A European Constitution for Citizens: Reflections on the Rethinking of Union and Community Law' (1997) 2 European Law Journal 131.
[19] Some prefer not to use the term 'harmonisation' for the negative process, as this assimilation of the negative to the positive seems to gloss the essential differences between a democratic legislative process, and the judicial application of free movement rules. However, both consist of the imposition of a single Community rule which overrules any national laws which may conflict with it, and solves the particular problems arising from differences between those national laws. The process and generality of positive and negative may be importantly different, but their essential function, for which they are named, is the same.

law in lawsuits brought by individuals, challenging aspects of national law which they claim conflict with EU-granted rights.

The current position with respect to both types of harmonisation is this; the Court has laid down principles which go a great deal further than the actual cases have realised. The law exists in a strange state of unfulfilled potential.[20] On the one hand, the cases suggest, indeed entail, that both positive and negative harmonisation of many, perhaps most, of the structures of welfare provision have a sound legal base. On the other hand, harmonisation has not happened to any significant extent yet, and the possibility is generally denied in official documents. The prevailing governmental and institutional position is that most welfare has a social character, and is not subject to economic law.[21]

When the cases say the law is one thing and the government says it is another, one should be wary of the latter. It is certainly true that the state can make laws undoing judgments, and that courts may even react themselves to changing public and legal opinion. However, there is also a good chance that some bluffing is going on; if we deny it strongly enough, perhaps the potential litigants at least will believe us.[22] When the law is of a radical and fast-moving character, as EU law is, there is also always the risk that the ideas and principles just haven't been fully absorbed yet. States can't quite believe some of the things that the EU has forced them to do, and it has often taken decades for a fairly clear principle to be fully internalised.[23] On top of that, the strange politics of EU integration means that governments often reject in public what they agree to in private. For domestic public consumption they decry measures intruding on national competence, while in Brussels, for complex reasons including a cooler-headed awareness that the measures are necessary, they agree to them.

The apparent battle between law-maker and adjudicator is thus not over, nor are contradictions within the law resolved. It may be that the Court will change its tune, or the Member States will change the Treaty, or neuter it with secondary legislation. However, given the power of the Court to steer the law, and the fact that it has been fairly consistent until now, and that it has often been radical in the past, it is at least worth considering the possibility that it means what it says and decides, and then asking what that entails for the future. This is what the following sections try to do.

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[20] This is perhaps not so strange. Laying down broad principles which are then slowly, perhaps over decades, realized and enforced in the Member States is a common Court of Justice technique. See Hartley *Foundations of EC Law* (4th edn. OUP, 1999) at 79. Precisely because obedience to the law is relatively low, or at least often delayed, it becomes possible to sneak surprisingly radical principles into the case law. By the time Member States realize their implications - because national authorities are at last beginning to apply them, or the Court of Justice is using them more often and more widely - they have been around long enough to seem established.

[21] See the Commission Green Paper on Services of General Interest, COM(2003)270 final; Commission White Paper on Services of General Interest, COM(2004)374 final.

[22] Martinsen 'The Europeanization of Welfare – The Domestic Impact of Intra-European Social Security' (2005) 43 Journal of Common Market Studies.

[23] See the account of national court reactions to supremacy and direct effect in Craig and de Burca, EU Law (3rd edn, OUP, 2003) at 285-315. Also, Alter *The Making of an International Rule of Law in Europe: Establishing the Supremacy of European Law* (OUP, 2001).

3. Negative Harmonisation of Welfare

EU law requires that companies or individuals who wish to provide or receive economic services be free to do so, on a temporary or permanent basis, in all states of the Union.[24] Unjustified obstacles to cross-border provision or receipt of services, or to establishment in a Member State, are prohibited, and national judges are empowered and required to set aside national measures conflicting with these principles, at the suit of an affected party.[25] A lawsuit of this type is always built around a simple three-stage analytic structure: first, is the service involved 'economic'? Second, is there a restriction on the cross-border provision of this service – an obstacle to free movement in common lawyer's parlance. Third, is that obstacle justified by some legitimate goal and proportionate to its goal? If so, it may remain. If not, it is unlawful. The major impact of the EU on welfare to date arises from the application of these principles.

A secondary impact arises from competition law. In general the rules concerning competition and state aids apply to the behaviour of market actors, and come into their own once the move to a competitive state has been made.[26] It is free movement which requires the initial entry and exit of provider and recipient to be possible, and so brings about that transition. However, competition law also prohibits regulation protecting behaviour that would be anti-competitive were it engaged in by market participants acting freely.[27] For this situation to occur there are three requirements; for competition law to apply there must be an undertaking, which is an organisation acting in an 'economic' way. Then there must be a public measure protecting, encouraging or reinforcing behaviour by an undertaking or undertakings which is anti-competitive. Finally, there must be an absence of adequate justification for that measure.[28] As can be seen, the structure of the analysis is similar to that of a free movement case. However, the scope of application of competition to public measures is much narrower. If the state provides by law that hospitals may co-ordinate and fix prices or allocate patients to each other, then competition is engaged. However if the state fixes prices, or provides rules determining where patients will be treated, then it is not. Such rules will have much the same protectionist effect, but are seen as free movement matters. Any challenge to them must be made on the basis that they tend to protect existing providers and exclude new ones, and thus make it harder for foreign providers to enter the market.

In certain contexts within the welfare state legal protection of anti-competitive behaviour is of great importance. Laws may grant the professions the power to regulate themselves and their

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[24] Articles 43 and 49 EC.

[25] Case 6/64 *Costa v Enel* [1964] ECR 1141; Case 26/62 *Van Gend en Loos* [1963] ECR 1; e.g. Case C-33/74 *Van Binsbergen* [1974] ECR 1299.

[26] See generally Buendia Sierra, *Exclusive Rights and State Monopolies under EC Law: Article 86 (former Article 90) of the EC Treaty* (OUP, Oxford, 1999); Blum and Logue *State Monopolies under EC Law* (Wiley, 1998); Lang, n 9 above; Biondi and Rubini 'Aims, Effects and Justifications: EC State Aid Law and its Impact on National Social Policies', in Dougan and Spaventa, n 9 above; Hatzopoulos, 'Killing National Health Systems but Healing Patients' (2002) 39 Common Market Law Review 714 et seq; 'EU Competition Law and Health Care Systems' in Mossialos and McKee, n 8 above; Karl 'Competition Law and Health Care Systems' in McKee, Mossialos and Baeten (eds) *The Impact of EU Law on Health Care Systems* (Peter Lang, 2002); Buendia Sierra and Hancher 'Cross-Subsidization and EC Law' (1998) 35 Common Market Law Review 901.

[27] Articles 81 and 82 in conjunction with Article 10 EC; Case 13/77 *G.B. INNO* [1977] ECR 2115; Case 267/86 *Van Eycke* [1988] ECR 4769; Case C-140/94 *Chiogga* [1995] ECR I3257. See Lang, n 9 above, at 50-65.

[28] Article 81(3); Article 86(2); See Lang, ibid.

activities, and it may, of most relevance here, grant powers to non-state collective insurance funds, for example enabling them to require compulsory affiliation from all members of a profession or industry sector. The application of competition law to public measures is therefore considered below. However, the emphasis is on free movement, as the primary governor of law and regulation. This paper is above all concerned with the transition to competition, and with the legal structure of the welfare state. Once that structure has changed to a market-based one, another story begins.

The sections below deal with the three steps of negative harmonisation: application, the finding of a restriction, and justification. The most important of these is the first. Including welfare within economic law is a paradigm change for both European states and European integration. Whether or not the legal consequences of that inclusion follow the analysis here, it is a safe bet that they will be significant. Welfare and free movement cannot mix without major revisions to the principles presently underlying one or both.

3.1 ARE WELFARE SERVICES ECONOMIC?

To fall within the scope of free movement law a service must normally[29] be provided 'for remuneration'.[30] 'Remuneration' is understood by the Court to mean a consideration-like payment,[31] but does not have to be from the party receiving the service.[32] Importantly, it does not matter who provides it, so long as the service provider can be said to be paid for their work.[33] To be an 'undertaking' for competition law purposes an entity must be engaged in an activity which is, or could be, performed on a competitive market.[34]

Emphasis on the transaction

In deciding whether these requirements are satisfied the emphasis in both cases is on the transaction or activity in question rather than the entity.[35] A public authority will in general not be an undertaking, but may act as one in certain circumstances (auctioning used vehicles, for example), and may offer certain services which are not for remuneration (clearing public

[29] The role of the word 'normally' remains unclear. It could apply to the individual service or institution, and be intended to deal with the situation of special offers or discounts. Alternatively it could apply to the 'type' of service, and ensure that once a sector was brought within the law all institutions, even the charitable or public, would be dealt with equally. This last interpretation would however be radical; it would mean that liberalization in one state, or partial free-market provision within the state, would 'suck' non-economic providers into the internal market too. Hence even non-economic services might be caught. The caught has never directly addressed the meaning of 'normally' but there is no suggestion of the radical second meaning in its discussions, with each institution or service being brought within the law being individually categorized as 'economic'.

[30] Article 50 EC.

[31] Case C-236/86 *Humbel* [1988] ECR 5365.

[32] Case C-352/85 *Bond van Adverteerders* [1988] ECR 2085; Case C-157/99 *Geraets-Smits and Peerbooms* [2001] ECR I-5473; Koutrakos 'Healthcare as an Economic Service under EC Law' in Dougan and Spaventa, n 9 above, 105 at 113.

[33] Koutrakos, ibid, at 115.

[34] Case C-41/90 *Höfner and Elsner* [1991] ECR I-1979; Case C-67/96 *Albany* [1999] ECR I-5751; Opinion of the Advocate General in Case C-218/00 *Cisal* [2002] ECR I-691 at para 38; Jones and Sufrin *EC Competition Law* (2nd edn. OUP, 2004) at 107; Karl, n 26 above at 167.

[35] Davies 'Competition, Free Movement and Consumers of Public Services' (2006) 17 European Business Law Review 95.

highways, freely done, advising on benefits and rights), and others which perhaps are (rodent-killing, for a price).[36]

In substance both requirements are the same. An entity providing services for payment is inevitably doing something that could be done on a market, and so is acting as an undertaking. An entity acting as an undertaking is inevitably being paid for its services. The contrast, in both cases, is therefore with the situation where a body provides services funded from its own wealth (rare, unless it is the state, on which there is more said below), or where the flow of money between source and service provider is so imprecisely linked to the services performed that there cannot be said to be 'payment'. This can occur when there is an open-ended promise of subsidy, or a guarantee of support for an institution.

The difference between this latter situation and payment is this; a payment for services is a market-like transaction, even if it does not in fact take place in a competitive context; as a defined exchange of value it is the sort of transaction that could. For example, other providers might wish to compete for the payment. The substantive question underlying both the free movement and competition application conditions is therefore whether a market-ready transaction is taking place.[37] If so, the law requires those transactions to be subject to market disciplines of openness and fairness.[38] By contrast, if there is no market-ready exchange, then market law simply does not apply. Payment is the evidence that a market-ready transaction is in fact occurring.

The first step towards liberalisation is therefore in the hands of states. However, once they do create a proto-market, a welfare system in which market-like transactions take place and there is the structural potential for competition and choice, economic law will pick up that ball and run with it, creating opportunities for everyone to share in those choices and to compete.

For convenience, services falling within free movement and competition law are conventionally referred to as 'economic' services, while 'non-economic' services fall without.

In deciding whether money flows constitute payment two factors stand out. These are the degree of separation of the paying and providing entities, and the directness and precision of the link between payment and service provided.[39] These two factors help identify a defined exchange of value. Other factors, such as the degree of subsidy involved, and the 'character' of the service are often mentioned as relevant but do not in themselves appear to be significant. A brief consideration of the situations which arise will demonstrate this.[40]

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[36] Opinion of the Advocate General in Case C-475/99 *Glöckner* [2001] ECR I-8089 at para 72; Case C-41/90 *Höfner and Elser* [1991] ECR I-1979; *Geraets-Smits*, n 32 above; Jones and Sufrin, n 34 above, at 110-112.
[37] Davies 'Welfare as a Service' (2002) 29 Legal Issues of Economic Integration 27; See also Mossialos and McKee, n 8 above, at 166.
[38] Ibid
[39] Davies 'Welfare as a Service' n 37 above.
[40] For a similar schematic analysis of these situations see Bernard 'Between a Rock and a Soft Place: Internal Market Versus Open Co-Ordination in EU Social Welfare Law' in Dougan and Spaventa, n 9 above, 261.

Where transactions take place without the involvement of the state, for example where a private insurance company pays a hospital, or an individual pays an educational establishment, it is uncontroversial that services are being provided for payment.
Even where the state is involved on one side of the transaction the same generally applies. If the state sells its services to the public (unusual) or pays private organisations to provide services to it or to individual citizens (more common) there is usually no doubt about remuneration. It takes only one party to a transaction to be commercial in behaviour to characterise the transaction as such.

The troublesome situations are (i) the situation where the service provider, although formally private, is of an almost public character, and behaves in a non-commercial way, and (ii) where both payer and provider are public.

An example of the first situation is a collective social fund responsible for a particular industry – say the teachers' pension and insurance fund. This is likely to have compulsory contribution from all teachers, and be responsible for various forms of social insurance for them. The Court has at times found such funds to be undertakings, and at times not.[41] In the former cases the funds were found to be operated according to a principle of 'solidarity' and to have an essentially 'social' character. [42] In other cases, by contrast, they were undertakings, but the Court prevented the full force of competition law taking effect by granting derogations based on their social importance.[43]

The social and non-economic character of the funds was supported by the Court by reference to many reasons, from an absence of profit motive to their social importance. All of these reasons have been consistently rejected as a basis for exclusion from the internal market in other cases, and should be treated as mere rhetoric[44] – particularly since they were equally applicable to the other funds, which were undertakings. What appeared to be more important – it was the factor that made it through to the operative part of the judgments - was whether the funds were self-sustaining (operated according to the principle of capitalisation, in the words of the Court) or received external subsidy, either from the state directly or via a system whereby social funds transferred money to each other to make up shortfalls or assist with financial difficulties.[45] This was the sole concrete factor which distinguished those funds found to be undertakings from those found not to be.[46]

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[41] See Barnard 'EU Citizenship and the Principle of Solidarity' in Dougan and Spaventa, n 9 above, 157 at 164; Boni and Manzini 'National Social Legislation and EC Antitrust Law' (2001) 24 World Competition 239.
[42] Case C-159/91 *Poucet and Pistre* [1993] ECR I-637; Case C-70/96 *Sodemare* [1997] ECR I-3395; Case C-264/01 *AOK* [2004] ECR I-2493; Case C-115/97 *Brentjens* [1999] ECR I-6025; C-219/97 *Drijvende Bokken* [1999] ECR I-6021; Case C-218/00 *Cisal* [2002] ECR I-691.
[43] Case C-244/94 *FFSA* [1995] ECR I-4013; Case C-67/96 *Albany* [1999] ECR I-5751; Case C-115/97 *Brentjens* [1999] ECR I-6025; C-219/97 *Drijvende Bokken* [1999] ECR I-6021 (these last two cases both concerned two funds); C-180/98 *Pavlov* [2000] ECR I-6451.
[44] See Mossialos and McKee, n 8 above, at 165; Hatzopoulos 'Killing National Health Systems' n 26 above, at 711; Davies, 'Welfare as a Service' n 37 above; Jones and Sufrin, n 34 above, at 107.
[45] Mossialos and McKee, ibid, at 169; Winterstein 'Nailing the Jellyfish: Social Security and Competition Law' (1999) 6 European Competition Law Review 324.
[46] Barnard, n 41 above.

The variable importance of solidarity and subsidy

This is often expressed in terms of solidarity, as if this is the vital concept.[47] However, solidarity can be achieved in two ways; internal cross-subsidy between clients of the fund, and external subsidy from the state, or from other funds. It is the latter of these which matters, as the cases, and good sense indicate. There can be no principle that internal cross-subsidy renders an activity non-economic without excluding eat-all-you-can buffets and airlines from the internal market. Indeed, there are few, if any, services where the customer pays for exactly what they get. Every standard package for a standard price involves cross-subsidy.

By contrast, external subsidy seems, prima facie, a better indicator of a non-economic character. Constant top-ups to prevent bankruptcy or shortfall do make a fund look less 'economic' and more 'social'. Nevertheless, external subsidy cannot in itself render a service non-economic. Otherwise state aid law would be self-destructing: the fact of subsidising a company would mean it was no longer engaging in 'economic' activities and so competition law (including state aid) would no longer apply.

Rather, external subsidy, if it becomes significant enough, may mean that the contribution of the service recipient – the teachers – is no longer sufficient to be characterised as payment for what they receive. It may have become a 'symbolic' contribution to a system essentially funded by the state.[48] Perhaps this point is reached when state subsidy is a fund's majority income.[49]

The question then arises whether the state subsidy itself could be seen as payment for the services provided – after all it matters not who pays, so long as someone does. In one sense payment is precisely what it is. However, too broad an interpretation of payment renders the requirement vacuous;[50] every service requires funding from somewhere. Even a priest has to eat. The question is whether the subsidy is in exchange for the services, in a contract-like way. In the cases involving non-economic social funds it clearly was not.[51] That can be supported and understood by looking at the way subsidies and top-ups work.

In commercial transactions terms are, generally, fixed in advance. There may be a fee for a service, or a fee for a bundle of services – you will treat all patients who arrive between now and March, all students who enrol this year. However, a relationship of the form 'you will provide services and I will give you the money you need to stay afloat' – is alien to commerce. The discrepancy between the price agreed in advance and the actual cost or value is the essence of deal-making.[52] Hence there must be initial terms. Thus if the state were to agree to pay a certain amount per teacher to the fund for the next three years in return for that fund's provision of services, this should perhaps be called a provision of services for payment, and the fund would be behaving as an undertaking. If the fund goes to the state cap in hand and receives a bale-out, while the income may be the same the transactional structure is different. The problem with

[47] See discussion in Barnard, ibid.
[48] *Humbel*, n 31 above.
[49] Davies 'Welfare as a Service' n 37 above.
[50] Koutrakos, n 32 above, at 114.
[51] The point does not appear to have been argued as such. Still, this absence of remuneration is implicit in the ratio of the cases.
[52] See Hatzopoulos 'Killing National Health Systems' n 26 above, at 706.

characterising such relationships is that they may consist of a mix of apparent 'contracts' and bale-outs. The political reality may be that the fund cannot be allowed to fail, and has in effect an open-ended guarantee. The renders the 'contracts' somewhat artificial, and it could well be argued that even if considered alone they would comprise 'payment' that character is undermined by the broader financial relationship. In short, when leaky social funds are essentially guaranteed public support, the financial relationship between them and the state is no longer one of remuneration.

The tendency has often been to assume that wholly state funded and provided services are non-economic. However this cannot be a general rule. Governments can own organisations that compete actively on open markets, and even tender competitively for government contracts.[53] Mere ownership is not the point. Yet where a public university provided almost free education to students the Court did not hesitate to find it a non-economic activity, and did not even consider whether the state funding might be payment (admittedly it was apparently not argued).[54]

It probably would not have been. For one thing, the university was probably under the control, perhaps even an element of, one or other ministry. For another, it probably had a budget containing large amounts for fixed salary and infrastructure costs, and no pre-determined performance payments; no payments per class, or per student, or per publication. That was, until recently, not the European way. Both factors mean that it would have been difficult to identify any reasonably precisely defined contract-like exchanges. Without such exchanges, flows of money are better called 'funding' or 'subsidy' than 'payment'. Hence the university was non-economic. By contrast, a public hospital which provides all the hip-replacements in a given town in a given year in return for a fixed sum from a public insurance fund would be providing economic services, notwithstanding the public character of both sides of the deal.[55] The transaction is large, but market-ready.

Changing welfare states

Following the above analysis, a few decades ago it would have been unconvincing to describe the majority of welfare services as 'in return for payment'. Education and health care were largely provided by public institutions, whose funding was not directly linked to the services they provided; it was not per head, or per operation. Even social insurance, while often funded by worker and employer contributions, tended to involve so much intra- and inter-institutional subsidy that the link between what an individual paid and what they received was more symbolic than measurable. One bought entrance to a system in which benefits were then provided on a basis of need more than contribution. The contribution provided by the individual and the benefit provided by the state were reciprocal in a moral-constitutional sense, but to describe their exchange as a purchase transaction would have surprised many. On the other hand, the state payments were ad hoc and open-ended, and so did not constitute payment either.

[53] See generally on this Jones and Sufrin, n 34 above, at 110-118.
[54] *Humbel*, n 31 above.
[55] This form of block-contract relationship is found in the Dutch health-care system, and was considered in *Geraets-Smits*, n 32 above.

That is significantly less true today. A number of trends in welfare make it far easier to identify payments for services.[56] The most obvious is simply privatisation; particularly in health care many states make greater use of private providers within their system than was formerly the case.[57] A second trend is to put greater emphasis on cost control.[58] That is partly the result of economic and budgetary disciplines resulting from EU membership, and particularly the Euro,[59] and partly the result of a perception that international competition requires European states to reduce their tax burden, and consequently to reduce spending.[60] In recent decades the fashion has been to think that competition and market-like behaviour within public organisations can contribute usefully to this process.[61] Thus there is greater use of payment linked to performance, with institutions being reimbursed according to what they achieve – how many patients they treat, or students they graduate, for example. Finally, greater individual choice has become a motif within public sector reform, with governments placing an emphasis on allowing individuals to choose which doctor, school, or pension provider they deal with.[62] A consequence of this has often been that financing systems change, so that money follows the consumer rather than the provider; if a patient or a child enrols, the institution treating or teaching them will be paid for this by the state; invisible vouchers, since the term as such is not yet widely used in Europe.[63]

All of these trends create and expose payments where previously there was funding; for that operation the hospital received so much; for my teaching and examination the university received that; and so on. In health care, the Court has already indicated that it considers the entire sector to consist of economic activity, whether public institutions are involved or not.[64] Where higher education is concerned, it has indicated the reverse, but in the context of a monopolistic

[56] Davies 'Competition, Free Movement, and Consumers of Public Services' n 35 above; Koutrakos, n 32 above; Lang, n 9 above, at 46; Wyatt 'Community Competence to Regulate Medical Services' in Dougan and Spaventa, n 9 above, 131 at 135.
[57] Burchhardt 'Boundaries between Public and Private Welfare: a Typology and Map of Services' Centre for Analysis of Social Exclusion Paper no. 2 (1997), available from www.sticerd.lse.ac.uk; Ascoli (ed) Dilemmas of the Welfare Mix: New Structures of Welfare in an Era of Privatisation (Kluwer/Springer 2002); George 'Political Ideology, Globalisation and Welfare Futures in Europe' (1998) 27 Journal of Social Policy 17; Wyatt, ibid. C.f. Kautto, n 4 above.
[58] Abel-Smith and Mossialos 'Cost-containment and health care reform: a study of the European Union' (1994) 28 Health Policy 89; Ham and Brommels 'Health care reforms in the Netherlands, the United Kingdom, and Sweden' (1994) Health Affairs 106.
[59] Panic 'The Euro and the Welfare State' in Dougan and Spaventa, n 9 above, 25.
[60] There are varying views on the accuracy of this perception. See Avi-Yorah Globalization, 'Tax Competition and the Fiscal Crisis of the Welfare State' (2000) 113 Harvard Law Review; Pieters (ed) European Social Security and Global Politics (Kluwer Law International, 2003); Rhodes *Globalisation, European Economic Integration, and Social Protection* (European University Institute, 2002).
[61] See e.g. Weiler 'States, Markets and University Funding: New Paradigms for Higher Education in Europe' (2000) 30 Compare: A Journal of Comparative Education, 333; Neave 'On the cultivation of quality, efficiency and enterprise: an overview of recent trends in higher education in Western Europe, 1986-1988' (1988) 23 European Journal of Education 7; Ascoli, n 57 above; Abel-Smith and Mossialos, n 58 above. See Marmor, *Fads and Fashions*, n 1above, for a skeptical stance concerning markets and efficiency where healthcare is concerned.
[62] See Burchardt, n 57 above; Saltman and Figueras 'Analyzing the evidence on European health care reforms' (1998) Health Affairs 85; See more broadly Rosenthal *The Era of Choice. The Ability to Choose and the Transformation of Contemporary Life* (CUP, 2000)
[63] See Davies 'Competition, Free Movement and Consumers of Public Services', n 35 above.
[64] Case C-158/96 *Kohll* [1998] ECR I-1931; Case C-385/99 *Müller-Fauré* [2003] ECR I-4509.

Belgian state system with purely nominal fees.[65] Today, the contribution of fees to funding is much more important, and the behaviour of universities much more competitive and market-like. Many degrees in the UK, and some post-graduate degrees in other Member States, are now provided in a way that could clearly be said to be for remuneration.[66] So may much school education be; lacking the research function commonly attributed to universities school education finance is more transparent. The correlation between the educational service provided and the funding from the state is far more direct and persuasive than in the context of higher education, where cross-subsidy between faculties and between the different functions and sources of funds within a faculty may mean that identifying payment for education may be a great deal harder.[67] In fact in many states there is already significant competition between schools for pupils and a large part of school education is provided by non-state institutions who are remunerated by the state and/or parents.[68] There is a competitive market inhabited by undertakings.

Finally, within the social insurance world, the desire to control and contain budgets has led to pressure on collective funds to be self-sustaining and to adjust payouts according to income, rather than seeking tax-funded subsidy.[69] This is true within non-governmental institutions such as pension funds, which increase or adjust premiums or payments according to their fortunes, but also at the public level, where governments increasingly attempt to ring-fence particular funds, and to balance contributions and payments, rather than treating it as part of the greater tax revenue pot.[70] This makes it possible to identify given groups of payments as very much 'for' given insurance policies.

There have often been attempts to exclude economic law by arguing that services have a 'special' social importance.[71] Welfare services, however organised, have an inherently social, and non-economic, character, goes the argument. The Court rejects this unequivocally, holding that the special nature of services does not remove them from the scope of free movement.[72] The Treaty makes the same point concerning competition.[73] This is understandable. The line between socially important services and others is an impossible one. Who would want to live without food processing, news reporting, or transport? Indeed, if socially vital services were not within the Treaty it would seem equally arguable that socially vital transactions in goods should also be excluded; the structure of free movement law and competition is not different for goods and for services. So would the sale of food, medicines, vehicles and clothes be 'non-economic'? Bearing in mind that the philosophy of the internal market is that its provisions can ultimately improve the provision of the goods and services to which it applies, albeit with the need for derogations at

[65] *Humbel*, n 31 above.
[66] Davies 'Welfare as a Service' n 37 above.
[67] C.f. Commission decision on state aid N 37/03.
[68] See Hofman, Hofman, Gray and Daly, n 5 above.
[69] Smith *France in Crisis*, (CUP, 2004).
[70] Ibid.
[71] *Humbel*, n 31 above; Case C-109/92 *Wirth* [1992] ECR I-6447; *Kohll*, n 64 above; *Geraets-Smits*, n 32 above; *Müller-Fauré*, n 64 above; Case C-159/90 *SPUC v Grogan* [1991] ECR I-4685; Case 279/80 *Webb* [1981] ECR 3305.
[72] Ibid.
[73] Implicitly, by granting derogation from competition law where necessary for the 'performance of the particular tasks assigned to them' for bodies providing such services; Article 86 EC.

times, it seems a sensible choice to do the work of protecting welfare at the stage of justification, rather than of applicability.[74]

Does it matter anyway?

The categorisation of domestic welfare services as economic is often less important than governments seem to think it is. The most common situations are either that an individual wishes to receive services abroad and is denied reimbursement by their state, where they would receive it were a domestic provider used, or that a foreign service provider wishes to market its activities in a state and encounters regulatory or policy obstacles. In both these cases the services that are to be received or provided are manifestly 'for remuneration'. It is precisely because the foreign hospital is demanding payment that the patient is forced to demand and sue for reimbursement. It is precisely the hope of being remunerated for their activities that induces foreign providers to enter a market; international charities apart. The domestic system, which may be operated in a relatively non-economic way, perhaps free at the point of delivery, is not providing the services that are in issue in the case. Whether its services are 'for remuneration' is beside the point.

Rather, the role of the domestic health, education or social insurance system in such a lawsuit is as the obstacle; it is the offer of domestic services combined with refusal to pay for foreign ones which creates the disparity, the discrimination against the foreign, and the obstacle to cross-border services. Hence attempts by the UK government to argue that it should not be obliged to pay for foreign medical treatment because the National Health Service provides free health care, and is thus outside free movement law, failed. The point was moot.[75]

A sucking noise

The law above creates a mechanism of influence between states, which in turn generates momentum for the process of including welfare within economic law. This influence is the result, paradoxically, of the autonomy of states to create their own welfare systems. That autonomy does not, initially, oblige any state to organise their welfare in a market-like way. However, it permits it.

Once one, or more, Member States start to do this they create opportunities for entry to their system by residents of other states. Economically functioning institutions will welcome out of state clients as much as domestic ones – they will even seek them. This puts pressure on the more monolithic systems of other states to adapt to that exit, which is likely to mean creating a more flexible domestic welfare provision mechanism and decentralising the risks of client loss away from the state – liberalisation. Economically functioning institutions in one state will also have a natural desire to enter other markets, thus forcing less market-like states to defend their closed systems, which as is seen below is difficult. They can, in principle, maintain non-market like provision while allowing market-providers to operate alongside, but the economic fragility of the public institutions in such a context once again creates a pressure for liberalisation.[76]

[74] See also Koutrakos, n 32 above, at 113.
[75] *Müller-Fauré*, n 64 above. See also Davies 'Health and Efficiency: Community Law and National Health Systems in the Light of *Müller-Fauré'* (2004) 67 Modern Law Review 94 at 101-102.
[76] See Martinsen 'The Europeanization of Welfare', n 22 above.

On a more political level, the widespread provision of welfare within a market changes the concept of 'normality'. It is now accepted that health care is 'normally' provided for remuneration, while education is not. Changes in a sufficient number of states change the perception of what is 'normal', and that perception will then influence the application of the law in others.

3.2 RESTRICTIONS ON FREE MOVEMENT AND COMPETITION

Given the presence of economic activity, the next stage is to ask whether there are restrictions on free movement or competition. A restriction on the free movement of services is any measure which hinders or makes less attractive the provision or receipt of cross-border services.[77] A restriction on competition is a convenient abbreviation for any measure which prevents, restricts, or distorts competition, or is liable to do so, and as such is *prima facie* prohibited.[78] The two definitions apply in general to different actors – to state and private parties respectively, but are otherwise essentially equivalent.[79] They catch measures which preserve the market structure and make it harder for customers to change provider or for new providers to enter the national market. They are as broadly applied as their wording suggests.[80]

The welfare state abounds with such measures. They are its essence. It is defined by national closure and state direction. Examples will make this clear.

Health care cases have led the way, with a number of law suits by patients wishing to go abroad for medical treatment.[81] All participated in national insurance schemes which provided for health care within their own Member State, but refused to pay for it abroad unless a medical need could be shown. The Court of Justice found this to be in conflict with the Treaty. It was a violation of free movement and non-discrimination for an insurance policy to restrict its payments to providers in a particular state. Where hospital treatment was concerned, the Court found that the financial risks involved in allowing patients to seek treatment abroad at will might be so significant that a restriction of their choice might be justified.[82] However, for outpatient treatment the national rules were set aside, and as a result individuals within the EU now have a right to receive such treatment in any Member State and be reimbursed as if it was at home.[83] Moreover, the justified exception for hospital treatment is likely to have a limited shelf-life; it

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[77] Case C-55/94 *Gebhard* [1995] ECR I-4165.
[78] Case 56 and 58/64 *Consten v Grundig* [1966] ECR 299; Case 56/65 *Société Technique Minière* [1966] ECR 235. There are other factors, such as an effect on inter-state trade, which may in some welfare situations be important but are beyond the scope here. See Jones and Sufrin, n 34 above, chapter 3.
[79] Ibid.
[80] See Jones and Sufrin, n 34 above, chapter 4; Spaventa 'From Gebhard to Carpenter. Towards a (non)Economic European Constitution' (2004) 41 Common Market Law Review 743; Davies *Nationality Discrimination in the European Internal Market* (Kluwer Law International, 2003).
[81] *Kohll*, sn 64 above; *Geraets-Smits*, n 32 above. *Müller-Fauré*, n 64 above. See also Case C-368/98 *Vanbraekel* [2001] ECR I-5363; Case C-56/01 *Inizan* [2003] ECR I-0000; Flear, annotation of *Müller-Fauré*, (2004) 41 Common Market Law Review 209; Cabral 'The Internal Market and the Right to Cross-Border Medical Care' (2004) 29 European Law Review 673; Hatzopoulos 'Killing National Health Services' n 26 above; Fuchs 'Free Movement of Services and Social Security – Quo Vadis?' (2002) 8 European Law Journal 536.
[82] *Müller-Fauré*, n 64 above; Davies 'Health and Efficiency' n 75 above.
[83] Ibid

was neither an absolute nor a necessarily permanent derogation. It remains open to patients to make arguments based on medical or personal circumstances for treatment abroad, and Member States are required to provide expedited and effective legal processes for assessing these.[84] The likelihood is that lawsuit numbers will swell, and there will be considerable pressure on insurance companies to amend their policies. It may well be easier to abandon the principle of national-only treatment, even at the risk of some loss of cost and quality control, than it is to maintain it against a growing tide of litigious patients backed by a purposive and unpredictable Court of Justice.[85] At the very least we may find that policies increasingly offer a 'treatment anywhere' option, even if this is more expensive.

Health care providers are likely to be ultimately a greater source of national restructuring than litigious patients. Medical institutions based in countries that allow profit-making or non-public hospitals are increasingly looking to expand abroad. Here they typically come across a number of obstacles. Some Member States do not allow medical institutions to be profit-making. [86] Most limit the numbers of hospitals in a given area, and may be hostile to a foreign company wishing to start a new one. Many will regulate the costs that may be charged for treatments,[87] and the kinds of treatments permitted; accepted medical treatment in one state may not be permitted in another, or may fall outside standard insurance policies, whose definition of what is 'medically necessary' is often largely based on national practices.[88] All of these rules may be quite understandable, but they will tend to make it more difficult for a foreign provider to enter the local market and constitute obstacles to movement.

In education there have been fewer and less dramatic cases, but this is because the process is at an earlier stage more than because of any fundamental conceptual difference. Analogous forms of arguments can be made. The parent wishing to send their child to a foreign school or college may find that their home state refuses to pay for this, or refuses to allow export of financial support, clearly creating an obstacle to movement.[89] At the moment it is sometimes the case that the cost of educating non-nationally resident schoolchildren is borne by their host government, a strange and illogical situation which can only survive while the number of migrants is small. The state with the obligation is that where the parents are members of society, and that obligation to

[84] Ibid; Hatzopoulos 'Killing National Health Systems' n 26 above, at 699-700.
[85] See, on the unpredictability of Community law for national courts, Wilhelmsson 'Jack-in-the-box Theory of European Community Law' in Kramer and Micklitz (eds) *Law and Diffuse Interests in the European Legal Order* (Baden-Baden, 1997) at 177-194.
[86] However, see Case C-70/95 *Sodemare* [1997] ECR I-3395, where a non-profit requirement concerning residential care establishments was considered justified. This argument is likely to be made again, in different contexts, and the varied rules on profit in different states make it not inevitable that a non-profit requirement will always be considered proportionate. The pressure to save and accumulate money found in non-profit making organizations has the same effect on behaviour as the pressure to make it found in profit-making ones. The commercial sector has no monopoly of self-interest. It will be at least arguable that the interests concerned can be protected by regulation, and given the powerfully exclusionary effect of a non-profit requirement the outcome of subsequent cases may be different.
[87] See e.g. Case 159/85 *Edah* [1986] ECR I-3359 on minimum prices as an obstacle to movement.
[88] *Geraets-Smits*, n 32 above; *Inizan*, n 81 above.
[89] See Van der Mei 'EU Law and Education: Promotion of Student Mobility versus Protection of Education Systems' in Dougan and Spaventa, n 9 above, 219; Dougan 'Fees, Grants, Loans and Dole Checks: Who Covers the Costs of Migrant Education within the EU?' (2005) 42 Common Market Law Review 943; Davies 'Higher Education, Equal Access, and Residence Conditions: Does EU Law Allow Member States to Charge Higher Fees to Students not Previously Resident?' (2005) 12 Maastricht Journal of European and Comparative Law 227.

pay for education on a non-discriminatory basis – i.e abroad if the parents so wish - is not yet fully realised.[90]

There may also be quotas for certain courses of study, and states facing large numbers of incoming students may be tempted to give priority to locals.[91] The university wishing to open a branch in another Member State and offer degrees there may discover a multitude of local laws which impede it. Most notoriously, foreign universities attempting to operate in Greece have found themselves on the wrong side of the national constitution, which makes higher education a state monopoly.[92] This is in irreconcilable conflict with the Treaty, and while Greek courts have been reluctant to accept this,[93] unless they are prepared to reject the supremacy of EU law, an act of defiance which would be close to judicial rejection of Membership of the EU, the days of the national monopoly are numbered.

At the more mundane level, even national syllabi, rules on teaching, or ownership and operation of schools and institutions may be restrictions, if they make it harder for foreign institutions to enter the state – as they will do. A major restriction is likely to be states that refuse to pay, or to pay equally, towards the cost of non-state schools. At the moment educational freedom is the norm in Europe, in that parents may choose to send their children to privately run schools. In some states these provide most education, in others just a small percentage. They very often receive a contribution to their costs from the state, with parents making up the rest. However, if such schools are foreign-owned, wishing to provide educational services, then a choice by the state to only partially pay for education there, while they would fully pay for it at a state school, is clearly a restriction on establishment – it will tend to hinder the establishment of foreign schools.[94] The situation is precisely analogous to that which has arisen in the context of medical care.[95]

Many will see this as surprising. Surely a state should be allowed to run its own schools? Why is it obliged to pay non-system schools as well? Is this not an obligation to privatise, contrary to the official position that the EU is neutral on questions of ownership?[96] Yet the fact is that provision of free education at nationally owned schools and a refusal to pay the equivalent costs to foreign owned ones quite clearly steers local pupils to the national schools, which is prima facie discriminatory, as well as a deterrent to any foreign schools wishing to enter the market. That is not at all to say that such a position could not be justified by other factors, but that the substantive discussion of whether EU law allows such a national preference is to be done within

[90] Ibid; Davies 'Any Place I Hang my Hat, or: Residence is the New Nationality' (2005) 11:1 European Law Journal 43.
[91] Case C-147/03 *Commission v Austria* [2005] ECR I-0000. See Van der Mei, 'EU Law and Education', n 89 above.
[92] Maganaris 'The Principle of Supremacy of Community Law in Greece – from Direct Challenge to Non-Application' (1999) 24 European Law Review 426.
[93] Ibid
[94] Mossialos and McKee, n 8 above, 179; Blum and Logue, n 26 above, at 140-144.
[95] See *Geraets-Smits*, n 32 above.
[96] See Article 295 EC; Szyszczak 'Public Service Provision in Competitive Markets' (2001) 20 Yearbook of European Law 35 at 36-37.

the context of justification rather than within the context of applicability. Some of the policy reasons for this are discussed below.[97]

The oddity of the situation is this: insofar as the state prefers state run schools over domestically-owned private schools providing education within the borders, the situation is wholly internal. There is no cross-border element, and so EU law does not become involved. It requires foreign schools to want to enter the market (or parents to send their children abroad – the argument is similar) to engage that law. At the moment educational chains and multi-school groups exist only to a limited extent, and within particular nations. Hence the legal issue is still moot. However, as they become aware of their right to participate in foreign markets, and as Europeans become more aware of each other, we may expect growth. In particular, it seems likely that school organisations based in countries with good educational reputations may well be able to market affiliates in countries where educational discontent is higher. In the future it may not be odd that, say, a well-known university from one country will also operate a trans-European chain of schools, exploiting its reputation, and receiving payment from the states in which it operates according to the rates that each state's educational budget provides for – and perhaps also asking for top-ups from parents.

Social insurance offers some of the most interesting possibilities for diversification. In principle, an EU citizen may ask him or her-self why he or she is obliged to buy their unemployment or incapacity insurance from the state, via a compulsory deduction from the pay packet, when perhaps they could get a better deal from some other institution. The short answer lies in the need for risk-pooling in order to achieve solidarity; compulsory membership of the scheme means that the good risks can subsidise the bad, rendering universal coverage possible. Without this the European goal of a comprehensive welfare system is lost. Yet it is possible to reconcile the two; the premium paid by a good risk can be broken down into an element that is payment for that individual's own insurance, and an element that is contribution to the scheme as a whole. Solidarity justifies compulsion for the latter payment, but it is arguable that there is no reason why the individual should not be free to spend the personal element of their premium with the provider of their choice. In fact this is a simplification. There are numerous mechanisms for pooling of risk within a competitive market, involving inter-institutional or state-institution and institution-state transfers.[98] While these each raise their own legal issues,[99] they do indicate that national or sectoral monopolies are not necessary to achieve either solidarity or universal cover. Such allocation of the market is a significant restriction on provision and competition which may be difficult to justify.

Finally, one should also consider the minor parts of the welfare state, the many small services and institutions which link and integrate the larger more obvious ones, fill the gaps they leave, and create a true system. Crèches, job-centres, housing for the disabled (public housing generally is a subject in itself), specialised training and reintegration into the workforce, free transport for certain groups of people, ambulance services…many of these will be provided by autonomous

[97] See section 5 'Rolling Back the Law'.
[98] See Rice and Smith, n 2 above; Szyszczak 'Public Service Provision in Competitive Markets' (2001) 20 Yearbook of European Law 35 at 59-61. See also Buendia Sierra and Hancher, 'Cross-Subsidization', n 26 above.
[99] Buendia Sierra and Hancher, ibid; Szyszczak, ibid.

institutions, and remuneration for their services will be identifiable.[100] At the same time, there may be little meaningful choice for the customer or openness to new providers. Such interstitial services may provide some of the most accessible contexts for free movement arguments.

What is evident is that where free movement principles have their way, they will dismantle state structure, and indeed any structures of uniformity and compulsion. The corollary of freedom is diversity, at least in the short term,[101] and the potential for anyone to offer their services. For individuals this will tend to mean a right to exit, and to exportability of benefits, while for institutions it will mean a right of entry to national systems of provision, to share in the potential profits.[102]

Competition law works similarly. It addresses the situation where limited welfare markets already exist, and the state grants the players a role in determining how that market operates. They may be authorised to agree price ranges, share markets, limit forms of competition, and even determine whether the market can sustain new entrants. A particularly important example is where social insurance funds are given authority to require compulsory affiliation for persons falling within their sphere of activity, i.e. those within an industry sector or profession.[103] Such rules are also likely to be restrictions on free movement, and in the cases the arguments of both types blur into each other. If the activity is found to be economic then there will be a prima facie double offence, but in both cases the final result will turn on whether there is adequate justification.

3.3 DO NATIONAL SYSTEMS COUNT FOR NOTHING? THE ROLE OF JUSTIFICATION

The extent to which restrictive national structures survive the law depends upon the degree to which they can be justified.[104] For free movement it is merely necessary to show that national measures fulfil some pressing social or other need, and go no further than necessary.[105] This open approach to justification corresponds to the extremely low threshold for finding the existence of a restriction.[106] This is where the policy defence of national welfare systems at last finds its place. The state may argue that although its complicated and restrictive systems of domestic provision do indeed discourage individuals from going abroad for services, and do indeed make it hard for foreign providers to operate in their state, they are nevertheless so important and vital to society that they should take precedence over free movement.

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[100] See Case 76/97 *Tögel* [1998] ECR I-5357; Case C-475/99 *Glöckner* [2001] ECR I-8089; Case 30/87 *Bodson* [1988] ECR I-2479; Case T-319/99 *FENIN* [2003] ECR II-357, on appeal as Case C-205/03P *FENIN*.

[101] For an argument that negative harmonisation often serves primarily to prepare for positive see Davies 'Is Mutual Recognition an Alternative to Harmonisation?' in Bartels and Ortino *Regional Trade Agreements and the WTO* (OUP, 2006); and see below 'long-term harmonisation'.

[102] Although see *Sodemare*, n 42 above.

[103] See e.g. *Poucet and Pistre,* n 42 above; *Albany*; *Drijvende Bokken*; *Brentjens*; *Pavlov,* all n 43 above.

[104] See generally on justifications relevant to welfare, Jorens 'The Right to Healthcare across Borders' in McKee, Mossialos and Baeten (eds) n 26 above, 83, especially at 95-100; Nistor *Is the welfare state in danger from Community law? - balancing interests in the internal market* (University of Groningen PhD Thesis, forthcoming 2007).

[105] *Gebhard*, n 77 above; Gerstenberg 'Expanding the Constitution beyond the Court: The Case of Euro-Constitutionalism' (2002) 8 European Law Journal 172 at 175.

[106] Ibid. Koutrakos, n 32 above, at 116; Nickless 'The Internal Market and the Social Nature of Health Care' in McKee, Mossialos and Baeten (eds), n 26 above, 57 at 60.

Sometimes the state wins, but there are a number of reasons why it is more difficult to make a successful case than first appearances would suggest. Many of the justifications that spring to mind for restrictions on movement conflict with EU policy, and are effectively pre-empted. For example, in early cases it was common for states to plead the need to protect the consumer; how can we pay for medical treatment in institutions which we cannot supervise, and whose quality we cannot guarantee?[107] Therefore medical treatment will only be paid for within the jurisdiction. However, mutual recognition renders this case inadmissible without good concrete evidence for quality problems. The presumption must be that services abroad are of sufficient quality to meet national standards, and it is for the restrictive state to prove the contrary;[108] difficult since part of their case is that they cannot adequately know what is going on abroad! Moreover, merely pointing to differences in regulation – their law does not guarantee this – is inadequate. The principle behind mutual recognition is that different systems achieve more or less the same ends, are functionally equivalent.[109] Their differences are not as such reasons for rejection.

Functional and Economic Reasons

Another reason for restricting welfare freedom is often referred to as the 'cohesion' or 'coherence' of the national system.[110] In a well functioning welfare state institutions are often integrated with each other, as is their funding. Opting out of a single service can undermine the mechanics of the wider machine. For example standard presentation of information – job histories, income, medical treatment, education – shared between institutions means that qualification for benefits is easily established and cheating avoided. Out-of-system provision which does not result in such information being fed in to the national databanks undermines this. Individual power to opt-out ad-hoc also makes planning harder, with not only economic consequences but functional ones, as highly variable demand creates intermittent waiting lists or overloads.[111]

These are legitimate arguments, and will sometimes succeed, but are often reflexively conservative. On the evidence of the case law, states tend to defend their systems as they are without seriously considering if they could be flexible. Yet despite lip service paid to national autonomy to design welfare systems, it is quite clear that this must be done in a way respecting Community law.[112] That means that respect for free movement must as far as possible be built into the system.[113] Therefore it is not adequate for a state to plead functional problems alone. It must also show that it is not reasonably practical for it to adjust its system to allow the movement. Its restrictions must be genuinely necessary. This leads to hypothetical and

[107] *Kohll*, n 64 above; Case C-120/95 *Decker* [1998] ECR I-1831; Case C-19/92 *Kraus* [1993] ECR I-1663.
[108] See *Müller-Fauré*, n 64 above; *Kohll*, n 64 above; Case C-120/95 *Decker* [1998] ECR I-1831;
[109] Weiler 'The Constitution of the Common Market Place: Text and Context in the Evolution of the Free Movement of Goods' in P Craig and G de Burca (eds) *The Evolution of EU Law* (OUP 1999).
[110] Case C-388/01 *Commission v Italy* [2001] ECR I-721; Case C-204/90 *Bachmann* [1992] ECR I-249; Case 147/03 *Commission v Austria*, n 91 above; Hatzopoulos, 'Do the rules on Internal Market affect National Health Care Systems?' in McKee, Mossialos and Baeten, n 26 above, at 138-140.
[111] *Müller-Fauré*, n 64 above.
[112] *Kohll*, n 64 above; Davies 'Welfare as a Service' n 37 above, at 28.
[113] C.f. Maduro on the representation of out-of-state interests in national law; *We the Court* (Hart Publishing, 1998).

speculative debates whose difficulties are discussed below. Moreover, even if the problems are genuine, proportionality requires that they be balanced against the interests of the free mover. Institutional and collective interests do not always take precedence.[114] The making of this balance is invariably difficult, and the Court may be inclined towards an integrationist approach.[115] Moreover, the state desire for certainty may encourage them to adjust systems that might in fact be defensible rather than risk a negative law suit – gold plating as it is sometimes called, going beyond what the law clearly requires in order to avoid any risk of violation.[116] This is particularly the case since the Court has insisted that there must be accessible legal processes for individuals to vindicate their welfare rights.[117] Suing the state is not something that most citizens do lightly, but the Court is making it as realistic an option as it can. The sheer number of potential lawsuits may force states into retreat, especially given that where medical services are concerned individuals may be desperate – beyond being deterred by legal arguments, and motivated by a sense of moral right – and may, in generous European states, be supported by public assistance with legal costs.[118]

Finally, although it may be difficult to establish the force of this, the context of the balance is unsympathetic for states. Taking place as it does within an individual law suit there is invariably an individual with a sob-story, a need or desire for treatment or education abroad, and the state pitting apparently bureaucratic arguments against them.[119] Most readers reading the documents of a case, and so perhaps also most judges, will find themselves rooting for the individual. The Court reinforces this by requiring examination of all the particular circumstances of the individual; even a rule that in general is justified does not serve to automatically rebut an individual claim.[120] There must always be room for flexibility. This is an unusual and demanding approach to regulation.[121]

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[114] Davies 'Subsidiarity: the wrong idea, in the wrong place, at the wrong time' (2006) 43 Common Market Law Review 63 at 81-83.
[115] See Article 7 EC.
[116] Usually in the context of implementation of directives, but the logic is the same. On the practice, see e.g. Dimitrakopoulos 'The Transposition of EU Law' (2001) 7 European Law Journal 442.
[117] *Müller-Fauré*, n 64 above; Case C-208/90 *Emmott* [1991] ECR I-4269.
[118] The power of numerous lawsuits to achieve results which may themselves not be strictly legally necessary, by making it cost-effective to back down, is something new to Europe, but which is likely to develop in the future. See Montgomery 'Impact of European Union Law on the English Health Care Law' in Dougan and Spaventa, n 9 above, 145. In the context of enforcement of discrimination rights, see Davies 'Should diagonal discrimination claims be allowed?' (2005) 25 Legal Studies 181.
[119] The high-point of this may be *Geraets-Smits*, n 32 above, where a patient in a coma was transferred from the Netherlands to Austria for an innovative treatment. The Dutch insurance refused to pay for the treatment because it was not on the Dutch list of treatments shown to be effective – a list largely conforming to national medical practice, which is not in all areas at the cutting edge. However, the insurer maintained this argument *even after the treatment had successfully brought the patient out of his coma* and he had as a result begun to recover. While the formal argument that the treatment was experimental and unproven may remain good even after a single success, it takes a considerable amount of intellectual rigour not to be disgusted by an institution which maintains it was right on medical grounds not to pay for a treatment even after that treatment has effectively saved the patient's life. See Nickless, n 106 above, for discussion of the background to the case.
[120] *Müller-Fauré*, n 64 above; Case C-209/03 *Bidar* [2005] ECR I-2119; Case C-148/02 *Garcia Avello* [2003] ECR I-11613; Case C-147/03 *Commission v Austria*, n 91 above – 'it is for the national authorities which invoke a derogation from the fundamental principle of freedom of movement for persons to show in each individual case that their rules are necessary and proportionate to attain the aim pursued', at para 63.
[121] One may doubt whether national courts will fully respect it. Their instinct is more respectful of written law. See Jarvis *Application of EC Law by National Courts: Free Movement of Goods* (Oxford, Clarenden Press, 1998) at 220;

However, the greatest difficulties for states arise from the Court's presentation of free movement as more than an economic policy, but as a 'fundamental freedom', language clearly chosen to remind the reader of 'fundamental rights'.[122] Indeed, in recent cases it has explicitly indicated that free movement, even where businesses rather than individuals are involved, is something that has a moral force entitling it to be placed in a balance against more traditional rights and freedoms.[123] As a consequence of this approach, it is perhaps unsurprising that the Court has consistently found that 'purely economic' reasons can never justify a restriction of free movement.[124] The state may restrict movement to protect consumers, the environment, public health and safety, but never simply to save money. Freedoms are, implicitly, beyond price.

This decision is devastating for welfare structures. While there are some non-economic arguments for restricting welfare exit and entry, states' major concern about liberalising welfare provision is that it will lead to escalating costs. The form of the argument is usually that since the state is required to maintain an educational and health infrastructure for broad strategic reasons – this is what states do, it is unacceptable that the state might not be able to care for its own population – it must be able to guarantee a cost-effective level of usage of this. If individuals are permitted to exit the structure, or foreign entities to compete with it and undermine it, then it will become prohibitively expensive. Therefore even if the bill for medical or educational services abroad is lower than it would be at home, reimbursement may be a drain on national resources. The domestic bill includes a large element for fixed infrastructural costs which one way or another must be paid anyway. The state will effectively be paying twice.[125]

This is not a bad argument, but the Court has excluded it. It will only consider such a case where the financial impact of the foreign provision is such that the stability of the entire domestic system is threatened, so that the financial argument can be recast as one about health or education.[126] Hospital treatment, because of its huge infrastructural costs, was such a case.[127] The argument is far less convincing in the context of educational or social insurance establishments, which are far more easily adaptable to changing numbers – and where domestic demographic and social factors may dwarf the effects of cross-border exit in any case. Entry of foreign institutions is likely to ultimately have the greater effect, but in this case the national infrastructure is being maintained, so an argument from welfare is again not convincing. The

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Montgomery, 118 above. See also Davies 'Bureaucracy and free movement: A conflict of form and substance' (2003) Nederlands Tijdschrift voor Europees Recht 81-89. C.f. Baquero Cruz, 'Services of General Interest and EC Law' in de Burca, n 2 above, 169 at 210, that positive harmonisation tends to represent organised interests rather than individuals.

[122] For a recent example see Case C-109/04 *Kranemann* [2005] ECR I-2421.

[123] Case C-112/00 *Schmidberger* [2003] ECR I-5659. C.f *Bosphorus v Ireland* App no.45036/98 European Court of Human Rights, 30th June 2005.

[124] *Kranemann*, n 122 above; Case 72/84 *Campus Oil* [1984] ECR 2727; Case C-379/98 *PreussenElektra* [2001] ECR I-2099; *Kohll*, n 64 above; *Müller-Fauré*, n 64 above.

[125] *Müller-Fauré*, n 64 above. Although non-discriminatory cost-saving measures, such as insurance payout tariffs, are generally approved; *Müller-Fauré*, and Case 238/82 *Duphar* [1984] ECR 523. See on the interpretation of the 'purely economic' requirement Snell 'Economic aims as justification for restrictions on free movement' in Schrauwen *Rule of Reason: Rethinking Another Classic of European Legal Reasoning* (Europa Law Publishing, 2005) 37.

[126] Ibid.

[127] Ibid.

objection to entry must be based on the threat to the public character of the system – an argument of another type, discussed below.

The Court's approach has two fundamental weaknesses. One is that it is facile to oppose the economic to the moral as it implicitly does. States provide services paid for with money, and less money means fewer services to people who need or at least appreciate them. When made by a state there is no fundamental difference between a welfare and an economic argument. The other problem is that it remains ambiguous how any threat to system stability is to be judged. Manifestly, the costs in an individual case are never sufficient to panic the treasury. The Court is rather focussing on the costs of changing or abolishing a restrictive rule – how many more people would then exercise a similar cross-border choice?[128]

Evidential difficulties

Not only is this fantastically speculative, and estimates from well-informed experts differ wildly, but it is an ill-defined question if considered without a time frame. How many would go for treatment abroad next year, or how many would study abroad over the next ten years, or how many would buy their unemployment insurance from a foreign provider, ultimately, one day, next month?

This ambiguity works against the Member States. Because of the structure of the legal context, it is they who are on the defensive, and required to justify their restrictions. Therefore they must produce evidence indicating a threat.[129] How? Of course an American lawyer, or even some national European lawyers, might not be worried by this situation; they would commission experts, prepare reports, and proffer their own interpretation of how the question should be answered, and be prepared to fight that out in court. Unfortunately for this approach there is no tradition of meaningful empirical or quantitative analysis in free movement cases.[130] While many of the questions involved in free movement law are in essence empirical – would a given label confuse the consumer?[131] Is the environmental impact of a given product sufficient to justify its prohibition?[132] Are the health risks of internet pharmacies sufficient to justify their restriction?[133] – the Court's consistent tendency is to treat them as amenable to irreducible judicial wisdom.[134] The quantitative is reduced to the qualitative, so that the law abounds with unsupported judicial assertions as to the effects of a particular measure on a given market, or on producers, or on cross-border movement.[135]

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[128] Baquero Cruz, n 121 above, at 192.
[129] See Case C-147/03 *Commission v Austria*, n 91 above
[130] Davies 'The Division of Powers Between the European Court of Justice and National Courts: A Critical Look at Interpretation and Application in the Preliminary Reference Procedure', available on ssrn.com or, revised, as 'Abstractness and Concreteness in the Preliminary Reference Procedure in Nic Shuibhne *Regulating the Internal Market* (Edward Elgar, 2006).
[131] Case C-315/92 *Clinique* [1994] ECR I-347; Case C470/93 *Mars* [1995] ECR I-1923.
[132] Case C-302/86 *Danish Bottles* [1988] ECR I-4607.
[133] Case C-322/01 *Deutscher Apothekerverband* [2003] ECR I-14887.
[134] Davies 'The Division of Powers' n 130 above; Jarvis, n 121 above, at 190-195; Davies *Nationality Discrimination in the European Internal Market* (Kluwer Law International, 2003), chapter 5.
[135] Ibid; See also Weatherill 'After Keck: Some Thoughts on how to Clarify the Clarification' (1996) 33 Common Market Law Review 885.

Thus a state wishing to show that its restrictions are necessary must produce a non-quantitative argument. In practice this means one which indicates inevitability. It must be inherently, almost necessarily, the case that freedom would lead to mass-exodus. Such an argument does not exist; nobody knows what would happen if restrictions to welfare exit were removed.

To some extent the evidential position is exaggerated here. Free movement cases concerning private litigants begin in national courtrooms, and are, not always, referred to the Court of Justice. In principle how questions of effect are treated is for the national judge, who may accept an empirical approach notwithstanding the Court of Justice's more analytic one.[136] It may be, and it may be permissible, that national judges will in fact choose to engage with the details of sociological prediction and welfare-budgeting to decide whether the state has proved its need.[137] However it seems likely that judges will overwhelmingly take their methodological cues from what is the supreme court in this area. This is particularly so given that if they do not it is open to a litigant to force a reference, whereupon the case will essentially be relitigated under the European non-empirical methodology.[138] Admittedly, the Court of Justice may well be influenced by lower court evidential findings, but there is little evidence in the case law to suggest that it would be overly constrained by them. There is always a way to finesse fact through a new analytic gloss; when German courts appeared to be taking the view that consumers would in fact be confused by certain products and marketing practices, the Court indicated that it was the hypothetical well-informed and careful consumer that was at stake, not the average one, and so steered them to the result it wished.[139]

In any case, evidence would only progress the state so far. Assuming – although such mundane matters are never discussed before the Court of Justice[140] – that the appropriate burden of proof would be at least as strict as the Anglo-Saxon civil law 'balance of probabilities', it might well be difficult, in such a speculative context, for the state to make a case, even with all the experts in the world. It is very difficult to be convincing on the subject of what individuals will do in a context that does not yet exist – since exit options cannot be seen as fixed and static. Rather, as exit becomes possible providers will react to this to stimulate it and develop the market they wish to occupy, and the domestic system will presumably also adapt, within its capabilities, in order to retain its clients or mitigate the effects of their disappearance. It is rather like predicting how many people would abandon Barnes and Noble to shop at a different bookstore were that to open on Union Square, without being able to define precisely what the bookstore would be like or how

[136] See Case C-206/01 *Arsenal v Reed* [2002] ECR I-10273; Arnull, Annotation, Common Market Law Review 2003 753; Davies, 'Of rules and referees: Arsenal Football Club Plc v Matthew Reed', European Law Review 2003 408.

[137] Although this may be very difficult for them. These are not ideal issues for a court. See e.g. commentary on the Canadian Supreme Court's engagement with health policy, and criticism of its handling of empirical and comparative questions, in Marmor 'Canada's Supreme Court and its National Health Insurance Program: Evaluating the Landmark Chaoulli Decision from a Comparative Perspective' (2006) Osgoode Law Journal (forthcoming).

[138] Article 234 EC provides that a reference is compulsory from the final court in the national legal process. Thus by continued appeal any litigant can force a reference.

[139] *Mars*, n 131 above; *Clinique*, n 131 above; See Weatherill 'Recent Case Law Concerning the Free Movement of Goods: Mapping the Frontiers of Market Deregulation' (1999) 36 Common Market Law Review 51. C.f. Case C-210/96 *Gut Springenheide* [1998] ECR I-4657.

[140] Because in principle they remain for the national judge and fall within national procedural autonomy – they do not cross the Court-imposed limits of 'effectiveness' and 'equivalence', *Emmot*, n 117 above. This ignores the fact that in reality such factual issues may well be decided by the Court; Davies 'The Division of Powers', n 130 above.

Barnes and Noble would react. This predictive problem is exacerbated in the welfare context as some of the primary motivations to exit are the result of overcrowding, in education or health. These are mitigated by that exit, so that the more services are provided by out-of-system providers, the less motivation there is for others to leave.

A rational approach might be to wait and see. Allow freedom, since it is a premise that this is a good thing, and see how it goes. If it does seem to be developing to the point where domestic systems are undermined, then impose the restrictions necessary to deal with this. If that threat never arises, then there is no issue to deal with. Thus the frantic resistance of Member States to these very first free movement and welfare cases is at first glance odd. Nothing would make their case more convincing than being able to show that system exit is indeed spiralling as they had feared. The case for restrictions will be much more persuasive if made later in the liberalisation process than at the beginning, and a glimpse into the abyss might persuade the Court to close off welfare to free movement much more conclusively than Cassandra-like prophesies made at a time when the number of actual welfare migrants is tiny. A drop may become a flood, but that claim will be more plausible if made five minutes later when it has become a stream.

Unfortunately this ignores both political and legal reality. Firstly, taking rights away from the public is harder than not giving them in the first place. Secondly, EU law is pervaded by a philosophy of unidirectionality.[141] Integration proceeds, perhaps slowly, but it does not regress. There are exceptions, but they stand out as such,[142] and the general practice conforms to the general rhetoric of ever-deeper and ever-more. Given this it would be a brave state that would gamble on re-introducing restrictions once abolished. Fact may look law in the face, but it is never a match for ideology.

Proportionality

Many of the difficulties with the justifications above can be seen in terms of proportionality. The concerns raised are generally legitimate ones, but state control or monopoly, or discrimination against foreign providers, are relatively extreme measures in the lexicon of free movement, and go further than the concerns raised strictly require. The existence of private provision of welfare services in many Member States demonstrates that it is technically possible to achieve a high quality universalist welfare state by regulation.[143] To restrict openness more than such a system entails is therefore not justified by the pursuit of this goal. Public and monopoly provision may have been necessary to bring welfare states into being, but it does not appear necessary to operate them today. If it has an importance, it lies somewhere other than the functional sphere.

[141] See preamble to the EU Treaty (" an ever-closer union"). Cases reflecting this well include Case C-209/03 *Bidar* [2005] ECR I-2119; Case C-413/99 *Baumbast* [2001] ECR I7091; Case C184/99 *Grzelczyk* [2001] ECR I6193; Case C148/02 *Garcia Avello* [2003] ECR I11613.
[142] Case C-267/91 *Keck* [1993] ECR I-6097; and as a result perhaps the most discussed Court of Justice judgment. Similarly, Case C-376/98 *Germany v Parliament and Council* (Tobacco Directive) [2000] ECR I-8419.
[143] More cautiously, Scharpf 'The European Social Model: Coping with the Challenges of Diversity' (2002) 40 Journal of Common Market Studies 645 at 649-651.

The unspeakable case

The final problem facing states defending the status quo is that their core non-economic arguments have an amorphous and ideologically complex, not to say dubious, quality. They are difficult to express and difficult to make respectable. At the moment it is likely that in the collective consciousness of national policymakers they are not even fully formulated. They are arguments that sit in the gut, and rise to the head only when the gut is squeezed.

These are the ones about identity and national cohesion. As will be suggested below, much of the importance of national welfare systems is in how they create a sense of belonging and national togetherness. A part of this must be a legitimate reason to defend them. There is nothing inherently wrong with being part of a community – it is probably a basic human need - and the nation is one of the communities to which most people belong, however complex and incomplete that belonging may be. Taking apart the structures of a community is something that deserves a little thought and reticence.

Another perspective on this argument makes it look less savoury. Welfare is the last bastion of respectable nationalism, and as the surgeon occasionally has to cut into healthy flesh to be sure of his cure, the EU, in part a response to nationalism, will inevitably respond sceptically to pleading which smacks of this philosophy. States who talk of the threat posed to unity and national harmony by individuals who wish to put their education or health in the hands of foreigners expose the patriotic jugular to liberal attack.

There is something legitimate to be said on this subject. There should be a way for the law to consider these Janus-faced but not entirely wrongful claims. Neither litigants nor the Court have yet found it – or shown signs of looking for it.[144] The cases are currently proceeding without full argumentation. The interests of the nation are not fully represented in the European legal process.

There would be difficulties in changing that. For one thing it would require challenge to some of the basic norms of EU law. How can defence of the national boundaries to welfare be squared with a Treaty dedicated to the removal of national borders? Education captures this tension well. It may be the element of the welfare state with the greatest social cohesive effect (arguably), yet it is also the area where the EU chose to spearhead free movement, for closely related reasons.[145] The importance of education to the formation of a world view was behind the hugely successful student exchange programmes which the EU has always supported. Yet the creation of a generation of Europeans is just a positive gloss on the reduction of a sense of national belonging. Loyalty is a zero-sum game. To simultaneously attack and retreat on the educational front, to push for integration and allow states to resist it, might bring the law to a state of confusion.

More realistically, it can all be seen as a question of degree, rather than of opposition. Not whether, but how far, the removal of educational borders should go. Yet such broad-ranging

[144] Although see Case 147/03 *Commission v Austria*, n 91 above; Case 186/87 *Cowan* [1989] ECR 195, and Davies 'Any Place I Hang my Hat? Or: Residence is the New Nationality' (2005) 11 European Law Journal 43-56. See also Case C-41/90 *Höfner* [1991] ECR I-1979 and Case C-353/89 *Mediawet* [1991] ECR I-4069, discussed in terms of 'soft' justifications by Blum and Logue, n 26 above, at 145-152.
[145] Moschonos *Education and Training in the EU* (Ashgate, 1998).

policy judgments are hardly ideal for a court.[146] As well as being impossible to fit within an 'objective' judgment framework they are also empirical. In the absence of legislation one can imagine the natural reaction of judges would be to retreat from drawing such a line. But what would be a retreat? Both exempting education from free movement and including it involve making the policy judgment. Thus perhaps the most predictable approach would be to rely on the integrative mission entrusted to the Court and look at the cases through that lens. This would minimise the importance of national cohesion and emphasise that of Europe.

Good reasons

Member States are still free to define the scope of their welfare protection. What is covered by insurance and the extent of cover is, provided the terms are not constructed to be discriminatory or unreasonable, at national discretion.[147] Thus a refusal to pay for foreign services on the grounds that they fall outside national coverage is generally legitimate, and a refusal to pay foreign rates which may exceed national ones is legitimate too. These are a significant protection of national autonomy and budgets, and an important limitation on the freedom of individuals to travel the continent in search of the best service. They are also a significant limitation on the capacity of foreign providers to enter national markets, since their particular strength and experience may be in a service that does not fit national coverage. If the state pays for three year degrees, an institution offering superb four or five year ones may get few national clients. In the language of the law, the fact that the non-discriminatory terms of national coverage do not include a particular service is a legitimate justification for action – such as refusal to pay - that would otherwise be a prohibited restriction on free movement.

However much relief this finding of the Court may have brought to national ministries, it cuts both ways. As well as protecting treasuries, it also undercuts some of the arguments against free movement – that costs will spiral, or that it is unfair to allow treatments abroad that those at home do not receive. By conceding that Member States are entitled to define the 'what' of welfare the Court makes it harder for them to justify controlling the 'who'. This concession to national policy autonomy actually helps speed up the removal of borders and the institutional fragmentation of welfare provision.

Universality is another good, but limited argument. There is no doubt that the desire of the state to ensure universal welfare services of a high standard for its population is legitimate, and would be accepted as such by the Court.[148] Indeed, it is the official philosophy of the EU.[149] Since the basis of universality is cross-subsidy between citizens, it is often used as an argument for state monopolies; everyone must participate to ensure that everyone can be protected. If the good risks or the strong exit, the weak are left unprotected. However, provided the state has the capacity to tax and to regulate, cross-subsidy can also be achieved in a fragmented market. It requires mechanisms for redistribution of funds between different market players, and/or between

[146] Although see the discussion of justification in Blum and Logue, n 26 above, at 145-152.
[147] *Müller-Fauré*, n 64 above
[148] Hatzopoulos 'A (more) Social Europe: a Political Crossroads or a Legal One-Way? Dialogues Between Luxembourg and Lisbon' (2005) 42 Common Market Law Review 1599; Advocate General's Opinion in Case C-205/03P *FENIN*.
[149] See Articles 16 and 86 EC.

providers and the state, but such systems are certainly possible. Hence while universality is a good goal, it does not take states where they want to go; it will tend to be disproportionate to use it to justify excluding foreign or non-state providers from the field. It can be arrived at in a less exclusionary way.

Another argument sometime made is that states have the right to have the system of their choice. Since welfare provision falls primarily within their competence, it is for them to choose their system. Thus EU law should not impose obligations whose effects are such that the essential character or nature of the system changes.

At a formal, or narrowly legal, level, this argument has not succeeded so far, and does not look convincing. While Member States do indeed have free choice in how to organise welfare, this is subject, as are all their actions, to their Treaty obligations to free movement and non-discrimination.[150] There is no principle that EU law should only have limited effects. If a system is so little compatible with EU law that bringing it into line entails fundamental changes, so be it. A Treaty obligation is a Treaty obligation.

However, at a political level it is more persuasive. It can be presented in terms of the democratic desire of the population to organise in a certain way.[151] While that democratic desire can perhaps not extend so far as discrimination, if that population wishes to be in the EU, as a factor in weighing up less objectionable or extreme restrictions on movement it could be seen as legitimate.

Moreover, it can be put in a constitutional way, which may have the effect of engaging new legal issues and raising the stakes of the game. If state provision of a particular aspect of welfare – most likely education – could be seen as a part of the essential structure of the state or nation, then it might be that national supreme courts would be reluctant to apply EU law to override this. Although the Court of Justice takes the view that national constitutions cannot derogate from Treaty obligations, not all supreme courts have accepted this absolute view of supremacy. In several states a 'solange' position is taken, that if the EU were ever to infringe on key constitutional requirements or protections, the supreme court would at that point intervene.

In the event that welfare reorganisation were interpreted by supreme courts in such a way, this might provoke the Court of Justice to reconsider. As with human rights, where it formally rejected the relevance of national constitutions while in practice adapting its doctrine to accommodate them, the desire to avoid a showdown might lead to a softening of views on welfare and free movement. The key question here is the extent to which welfare opening would be seen by national courts as such a constitutional crisis, a matter beyond the scope of this paper. However, judgments from a number of states indicate that something like this cannot be excluded.[152]

[150] See e.g. *Kohll*, n 64 above.
[151] Scharpf 'The European Social Model', n 143 above, at 650-651.
[152] See e.g. The German Supreme Court in its Maastricht decision, BverfGE 89, 155; The Danish Supreme Court in Carlson v Rasmussen Case no. I-361/1997, Supreme Court 6 April 1998; Spanish Constitutional Court Opinion 1/2004, discussed by Castillo de la Torre at (2005) 42 Common Market Law Review 1169.

Competition law and services of general economic interest

Where free movement is concerned, the rule that a restriction may be justified was invented by the Court, and the list of permissible justifications has been kept open, subject to the limits described above. The Treaty also provides reasons to permit a restriction on competition, but these are narrow, and for procedural reasons also difficult to use. The major source of derogation from competition rules in the context of welfare is likely to be Article 86 EC.

This provides, in its second paragraph, that "undertakings entrusted with the operation of services of general economic interest …shall be subject to the rules contained in this Treaty, in particular to the rules on competition, in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them."

This is a paragraph that was created to deal with the privatization of industries such as telecoms, water, transport, and post.[153] The desire to maintain universal coverage, often at standard rates, and prevent, for example, rural areas being deprived of services or charged high rates for them, meant that an entirely free market could not be allowed. Obligations of universal service, often combined with exclusive or monopoly rights, are tools used to constrain these markets to maintain social goals. Article 86 is what renders this legitimate.

The phrase 'services of general economic interest' manifestly refers to services whose importance is economic, and general.[154] It catches services that form the general infrastructure of the economy and without which other business activities could not function. Such services often also have an important social function as well, but the phrase does not refer to this. That is odd, perhaps, but would not have made any functional difference. It is not stated that the 'tasks assigned' to the industries – such as a universal postage service – must be exclusively economic. The phrase 'general economic interest' is simply a designator, which services to capture the industries which were then in the picture, even if not fully to characterize them.

The problem is now that the law on services and establishment is reaching institutions and activities which were until recently not envisaged as part of the internal market; the welfare services under discussion here. Surely they deserve, demand, a protection of the form of Article 86? Yet it is not quite natural to describe these services as of 'general economic interest'. Of course in some sense they are important to the economy, but then so is policing and flood prevention and what is not? They do not, unlike their network cousins, contribute directly to the infrastructure of economic activity. Their function is primarily and most directly social.

This textual problem has been overcome by an act of deliberate misinterpretation as linguistically grotesque as it may be justifiable in terms of policy. The Commission, and lawyers, now act as if the phrase 'services of general economic interest' meant the same as 'economic services of general interest'.[155] Thus Article 86 is considered to apply to services of general

[153] See 'Communication from the Commission: Services of General Interest in Europe' OJ 2001 C17/4.
[154] Although Jones and Sufrin, n 34 above, note at 537 that the phrase is 'unhappy' because 'economic' is clearly intended to refer to the service rather than the interest.
[155] See the Commission Green Paper on Services of General Interest, COM(2003)270 final; Commission White Paper on Services of General Interest, COM(2004)374 final; Commission Communication on Services of General

interest – which clearly includes welfare services – that are provided in an economic way, and so would be subject to market law. Thus legal scholarship and official documents refer to two kinds of service; 'services of general interest', which are understood to be those of social importance, but provided in a non-economic way, and 'services of general economic interest' which are those of social importance, provided in an economic way. The linguistic violence involved is the same in other languages than English, and it is a mystery why there have not been more objections. However, the policy goal achieved is understandable.

Thus Article 86 offers a limited exemption from Treaty law for welfare services.[156] While it is primarily aimed at competition law, and tends to be used in that context, in principle it also applies to free movement. It is simply that since free movement is subject to case law based derogations the article is not so important in that context. However, as areas of activity move towards market-based provision, free movement and competition are often both relevant to a situation, and it does not seem unlikely that the Court will extend an already existing tendency to consider them globally in such contexts, bringing possible justifications within a single umbrella. In other words, Article 86 may come to be the primary legal framework for justifying restrictions on free movement and competition. In Commission documents it already is.

The significance of this is that Article 86 is functionally oriented. Its wording magnifies the argument above about the difficulty of offering identity and cohesion as justifications.[157] Admittedly, a Community law argument based on textual analysis alone is a naïve argument, *a fortiori* where services of general economic interest are involved, but if text counts for anything then the inclusion of Article 86 in the Treaty, and the tendency to treat exemptions under competition and free movement as fundamentally alike, may make restrictions harder to preserve, and extend the market.

The problem, once again, has its roots in the origin of the article. The network industries for which it was developed require massive infrastructure, and are often natural monopolies. Because of the costs of this infrastructure, and the realistic impossibility of multiple providers replicating it, a free market state will deliver neither as much competition nor as universal a service as governments want. The satisfactory reconciliation of competition and universality is perceived to require intervention in markets which would, in other contexts, be seen as restricting competition. The purpose of Article 86 is to authorize this. However, these arguments do not apply to welfare. The need for infrastructure, the structural difficulties with multiple providers, and the economies of scale are all far less. Merely achieving the core tasks of welfare does not require derogation from the Treaty. The reasons for derogation are more oriented towards the character of the system than its function. Article 86 does not reflect these concerns well.

Perhaps more importantly, it is clear that Article 86 assumes that even services of general interest, of the type that are socially important and should be available to all persons, may be

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Interest, n 153 above; Jones and Sufrin, n 34 above at 537; Obermann 'Services of General Interest in the Internal Market' Report Prepared for the European Parliament, February 2005, Project NO IP/A/IMCO/ST/2004-12 (available from www.esip.org/publications/pb49.pdf).

[156] See generally Buendia Sierra *Exclusive Rights and State Monopolies*, n 26 above; Karl, n 26 above, at 185-189; Blum and Logue, n 26 above, at 17-40.

[157] Although see Blum and Logue, n 26 above, at 145-152.

provided by a regulated market. It is because of the transition to this form of provision that the article was introduced. Thus while it provides a framework for restrictions on market actors and structure, it also provides a rebuttal of arguments that a regulated market cannot be used to provide welfare. On the contrary, the assumption of the Treaty is that social and solidarity-related concerns can be adequately addressed via regulation. This puts another difficulty in the way of states wishing to argue that the importance of welfare services must entail state, or national monopoly, provision.

4. Positive Harmonisation of Welfare

Positive harmonisation is the replacement of national rules by European ones. Three articles in the EC Treaty, 94, 95 and 308, allow harmonisation that could touch on the structures of the welfare state.[158] They may be used to generate legislation that removes distortions of competition, or obstacles to movement, or is otherwise necessary for the operation of the common market. In principle they could arguably be used to build a European welfare state, in which a structured and institutionalised system similar to that found in Member States was reproduced on an EU scale. There are, as will be seen, certain difficulties with this, and no sign of it actually happening.

The relationship between positive and negative harmonisation is complementary, or at least potentially so.[159] Many obstacles to movement may be removed by judges. If they cannot be, because the state can produce compelling justifications for their existence, then this can be taken as a cue for positive lawmaking. EU legislation may then deal with the problem. Hence for example the cross-border sale of pharmaceuticals at retail level may perhaps be legitimately restricted by states – these are potentially dangerous products, and it is difficult for a national authority to police such sales or be sure that supply conforms to good medical practice.[160] A judge might refuse to disapply national measures obstructing free movement but serving other important interests in this context. A solution might be European rules standardising the products that can be sold without prescription, and the form of prescriptions accepted by pharmacists, and creating a central register or even authority to supervise cross-border sales.

The three reasons to legislate are simple and broad. A distortion of competition is said to occur when differences between the laws in different states create a potential competitive advantage for industries located in one of them.[161] Differences in taxation, environmental and labour costs, and transport costs, are all potentially reasons to harmonise (albeit that there are restrictions on some of these as a result of other Treaty articles). The idea here is that only a uniform cost and regulatory base creates fair competition.[162] Whether or not that is true, it is hypothetical; given different physical and demographic circumstances uniform regulation would not create uniform costs. Moreover, given that the regulatory costs in nations differ in a multitude of ways, it is far

[158] Article 152 could also be mentioned. See Hervey 'Community and National Competence in Health after Tobacco Advertising' (2001) 38 Common Market Law Review 1421.
[159] Davies 'Can Selling Arrangements be Harmonised?', (2005) 30 European Law Review 370.
[160] *Deutscher Apothekerverband*, n 133 above.
[161] Case C-376/98 *Germany v Parliament and Council (Tobacco Advertising)* [2000] ECR I-8419; Usher, annotation, (2001) 38 Common Market Law Review 1519.
[162] Van der Laan and Nentjes 'Competitive Distortions in EU Environmental Legislation: Inefficiency versus Inequity' (2001) European Journal of Law and Economics 131.

from obvious that equalising a given regulatory cost renders the overall situation more, rather than less equal. It is also unlikely that the effects of regulation are the same for all industries. Once upon a time Greece had poor infrastructure, relatively few technologically trained workers, and few environmental rules. The Netherlands was the opposite. The EU has now largely harmonised environmental rules in the EU, partly in the name of undistorted competition. However, while certain industries in Greece may have been able to gain a competitive advantage over their Dutch peers by dumping rubbish in the Aegean, struggling Greek high tech industries may rather have envied the easy access to infrastructure and trained personnel that their Dutch competitors had, and experienced extra environmental cost burdens as increasing inequality rather than levelling. Of course there are other good reasons to protect the environment, but the generalised economic argument behind removing distortions of competition is over-simple. Harmonisation equalising specific regulatory costs tends to reflect successful self-interested lobbying by nations or industries, or a policy choice to forbid competition on certain grounds, whatever the consequences for equality. In any case, it has little to do with any objective interpretation of the overall competitive situation.[163]

Harmonisation to remove obstacles to movement is easy to understand; differences between national rules, such as on product standards, regulation of professional activities, or qualifications, obstruct movement. Activity permitted in one state may be prevented in another because it, or its provider, does not conform to local regulation. The concept of an obstacle is at least as widely interpreted as in the context of negative harmonisation (any measure which hinders or renders less attractive cross-border movement).[164]

Finally, Article 308 infamously offers a mop-up clause allowing any other harmonisation that might be necessary for the common market.[165] This is hardly strictly necessary, since almost any regulation imposes costs, so the goal of removing distortions of competition could be used to harmonise almost all national law.[166] However, both Court and Commission have historically been reluctant to draw this obvious conclusion from the definitions that they use, and Article 308 has been quite widely used.[167]

Clearly almost any regulatory or institutional aspect of the welfare state is both a distortion of competition and an obstacle to movement. It is hard to think of any element of education, health or social insurance where one could say that national systems make it just as easy to go abroad or to compete abroad as to stay at home. There is, at first glance, legislative competence to create a European welfare system.[168]

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[163] Ibid; Davies 'Can Selling Arrangements be Harmonised?', n 159 above.
[164] Davies, ibid.
[165] There appears to be no longer, if there ever was, an important difference in meaning between the phrases 'internal market' and 'common market'. See Case C-300/89 *Commission v Council* [1991] ECR I-2866; *Germany v Parliament and Council*, n 161 above. For criticism Gormley 'Competition and Free Movement: Is the Internal Market the same as a Common Market?' (2002) 13 European Business Law Review 517.
[166] Dashwood 'The Limits of European Community Powers' (1996) 21 European Law Review 113.
[167] See Von Bogdandy and Bast 'The European Union's Vertical Order of Competences: The Current Law and Proposals for Its Reform' (2002) 39 Common Market Law Review 227.
[168] More cautiously, but similarly, Wyatt 'Community Competence to Regulate Medical Services' in Dougan and Spaventa, n 9 above, 131 at 136-142.

The limitations on this are subsidiarity and proportionality, both general principles of EU law, and the Court's finding that any harmonisation within the internal market must address 'appreciable' distortions (this de minimis, or something similar, probably applies to obstacles to movement too, although the point has never been addressed).[169]

Appreciability simply serves to filter out the marginal, but this is hardly relevant to welfare. Cross-border welfare provision is not met by trivial discouragements, but by serious structural obstacles. Thus the last legal lines of defence against European welfare are subsidiarity and proportionality. The importance of these remains to be seen, and there are reasons to doubt whether they will be powerful constraints on competence.[170]

It may not matter. The most effective limitation on Community action is currently not legal but political; the absence of any legislative will. No Member State has expressed any desire to begin creating a European welfare system. Moreover, such a proposition would probably be domestic political suicide in most Member States. One may note the fierce resistance to including health care, already subject to market law, in the proposed services directive.[171] Countries and their populations appear quite clear in their current will to maintain control of their welfare systems and provide them with as much immunity as possible from EU law. Harmonisation of substantive aspects of welfare is not on the agenda.[172]

That absence of will is not surprising. The welfare state is one of the few areas of policy where almost every citizen has a direct and significant interest in policy decisions, and the reaction of the mass to such situations is usually, and understandably, to resist radical change except in the face of crisis. If your health, education and security depend on an institution, and it still seems to serve you well, you are likely to err on the side of caution when change is proposed. The attempts at reform of welfare in several European states in recent decades indicate how great the political inertia is.

From the point of view of national ministers in the Council, the primary legislators in any harmonisation process, they have little to gain through European measures. They are likely to be received with hostility at home – who wants to see control of such matters move further away from the citizen? – and they would also amount to a significant loss of political power for national politicians, including those ministers. Who gives away their own job? All this aside from the radical differences between European systems, which would make agreement impossible on what the European norm should be.[173] Finally, there are economic questions. Different states can afford different forms and levels of protection. To harmonise levels of welfare without subsidy between states would be intolerable, yet to speak of sharing the burden

[169] Wyatt, ibid; Usher, n 161 above.
[170] Davies 'Subsidiarity' n 114 above.
[171] COM(2004) 2 final, Proposal for a Directive on Services in the Internal Market. This directive has been amended by Parliament and is awaiting consideration by the Council at time of writing (March 2006).
[172] The only major welfare-related legislation to date concerns the social insurance and benefit position of migrants who transfer their residence or work to a new Member State (Regulation 1408/71, now Regulation 883/2004). Such legislation is an alternative to substantive harmonisation rather than a beginning. Its premise is the existence of diverse and autonomous national systems. See Martinsen in de Burca, n 2 above, and Pennings in Dougan and Spaventa, n 9 above.
[173] See Scharpf 'The European Social Model' n 143 above, at 650-651.

of welfare (the lion's share of national budgets) would be to speak of a step forward in integration far greater than anything yet experienced, at least since the inception of free movement.

Welfare harmonisation is not an all-or-nothing decision. It is discussed here globally for convenience, but one may imagine sector-specific, framework, minimal harmonisation to which some of the criticisms above would not apply. Still, even a marginal measure is likely to attract fierce resistance, not least because of the fear of a slippery slope. Currently many will take the view that the structure of welfare provision is outside the legislative competence of the EU. However legally unsupported that may be it creates a taboo in practice. This prevents even minor and helpful legislative measures.[174]

5. Rolling back the Law: Prospects for a Legal Retreat from Welfare.

The picture which emerges is of far-reaching negative harmonisation rules which continue to be applied, and are pushing a transition from public provision to provision in a European welfare market, combined with an apparent inability to take positive measures to balance this. However, pictures can change, and the inevitable response to the above is to wonder whether the Court will change its mind as public, political, or national judicial resistance grows, or whether the Member States will step in to amend the Treaty, or take other legislative action restricting the impact of the EU on welfare.

Some of the factors relevant to this have been discussed in the previous sections – the Court's consistent integrationist interpretation of the law, the logic of the Treaty text, and the political difficulties with legislation. However there are also deeper, less practical considerations, relevant to both the behaviour of Court and EU legislators, which make the opening of welfare more inevitable, less radical, and harder to reverse than might at first seem the case.

At this point the services directive should be mentioned. At the time of writing this has been approved by the European Parliament, will be put before the Council in a few months, and is expected to become law in more or less its current form later in 2006. It is an attempt to deal with the wide-ranging obstacles to free movement of services and establishment, laying down principles and procedure to deal with national laws which may restrict these freedoms. In general it not only makes a large number of forms of national restriction *a priori* illegal, but provides procedures for assessing others, as well as assisting in the informational and bureaucratic aspects of receipt and provision of cross-border services.

However, after much negotiation, the directive has been worded to exclude any application to welfare services. It repeatedly excludes application to healthcare services, and 'does not affect' services pursuing a social welfare goal, nor the liberalisation of services of general economic interest. The intention to confine the directive to traditionally commercial activities, and exclude social and welfare activities is very clear. Given the obvious strength of feeling in the Parliament, it seems unlikely that this aspect of the directive will be changed.

[174] However, for the longer term position, see 'long-term harmonisation' in part 7 'The Policy Implications of Welfare Harmonisation' below.

Yet this does not change very much in substance. The directive does not restrict the application of the Treaty freedoms to welfare services, where these are provided in an economic way, and nor could it do so. Secondary law cannot override primary. The case law and the principles of the law continue to apply. It is merely the case that cross-border educational, health and social insurance services will not be able to benefit from the additional clarity and procedural advantages that the directive offers.

This creates an odd situation. When situations arise concerning economic welfare services the directive will be an obvious interpretative guide. Even though it formally does not apply, as a document interpreting the relevant Treaty article it is perfectly relevant. And yet if the Court allows it to be used in this way, it is partially circumventing the clear intention to exclude welfare from its scope. This exposes an underlying choice. Will the Court effectively extend the directive, by taking a consistent approach to all kinds of services, or will it use the restrictive philosophy expressed by the exclusion of welfare as a cue to roll back its own case law? Similarly, we may ask whether, if the Court does not retreat, the Member States will in due course amend the Treaty to make clear that free movement and competition do not apply to welfare services. Secondary legislation would also be possible, but more vulnerable to annulment – it could be interpreted as an attempt to rewrite the Treaty in the Parliament and Council.

The most obvious form of retreat would be a statement – judicial or legislative – excluding services pursing essentially social or welfare aims from the scope of free movement or competition law. Many factors support such a move. It would have strong support in many states, and would seem to suit the current fashion for decentralisation and subsidiarity. The French constitutional referendum, the social charter, and the charter of fundamental rights could all provide a superficial basis for a more 'welfare-friendly' reading of the internal market.[175] None of these reasons, it may be noted, are especially convincing upon closer examination, but at least at a rhetorical and political level a move away from welfare would be easy to explain. However, practically and philosophically it would be very problematic, in several ways.[176]

Firstly, it may be noted that despite the economic aspect of much of free movement, it is fundamentally a policy of openness.[177] It does not dictate national policy beyond the requirement that it should not create barriers to movement, that is to say that it may not effectively exclude the foreign from participation in national activity. The exclusion of welfare from this is therefore a statement that it is not considered that such important areas of life should indeed be subject to any principle of openness. The foreign may not be excluded from commerce, but may be excluded from more socially important areas. Thus, in the absence of positive harmonisation creating a European welfare system, any systematic exclusion of welfare effectively reduces the EU to a trading block with a right of personal migration between states and a then somewhat

[175] See O'Leary 'Solidarity and Citizenship Rights in the Charter of Fundamental Rights of the European Union' in De Burca, n 2 above, at 39; Schoukens 'How the European Union Keeps the Social Welfare Debate on Track: A Lawyer's View of the EU Instruments Aimed at Combating Social Exclusion' (2002) 4 *European Journal of Social Security* pp. 117-150; Betten 'The EU Charter on Fundamental Rights: A Trojan Horse or a Mouse?' (2001) 17 International Journal of Comparative Labour Law and Industrial Relations 151;

[176] This is quite apart from procedural problems, which are here ignored. See Scharpf 'The Joint-Decision Trap: Lessons from German Federalism and European Integration' (1988) 66 Public Administration 239; Alter 'Who are the Masters of the Treaty? European Governments and the ECJ?' (1998) 52 International Organization 87.

[177] Advocate General's Opinion in Case C-205/03P *FENIN*.

anomalous emergent foreign policy. The philosophies of non-discrimination and non-nationalism which are at the heart of the EU are reduced to mere principles of economic efficiency, applying only to vulgar matters – to individuals, and to businesses - but not to the national structures that are the primary objects of EU law and of the EU mission. This is anathema to those who believe in a deeper purpose for the EU, and have a more than narrowly economic vision of its future. The exclusion of welfare would be the death knell of the constitution and of any constitutional EU ambitions.

The conflict between public provision and openness

The brutal fact which creates this uncomfortable position is that states don't integrate. Large public providers of services will tend to dominate their own markets, either by law or in fact, while failing to extend their activities across the border. Public welfare institutions simply do not think in terms of foreign expansion. If, by contrast, they do venture into foreign fields they are likely to be received as unfair competitors because of their state backing.[178] This will amount to prohibited state aid, and force them to retreat or restructure in the face of competition law. It is notoriously difficult for a publicly owned undertaking to be sufficiently sealed off from illegal assistance that it can compete freely. In any case, states do not like competing with private entities. If they fare badly they may be saddled either with debt or with the political costs of withdrawal from the market. Neither is attractive. Thus risk management will tend to drive states to cease provision in markets where they cannot be monopolistic or at least dominant, and retreat to regulation.[179] It follows that if one wishes to extend the philosophy of removing borders beyond traditional commerce and trade, this will entail private provision. There is no obvious way around this.

Thus there is a vision of a European welfare state, a single continent-wide bureaucracy, which seems distant and unpopular. Then there is a vision of national welfare states undisturbed by Europe, which treats the EU as a marginal economic entity. Finally there is a vision of a regulated market for welfare, in which each state ensures universal protection at the level of their choice through regulation and redistribution, but provision is without borders and hence non-public.[180] This is the only vision which is both European and realistic. Many arguments from democracy and economics – which tends to regard imposed solutions as inefficient - would lead to the exclusion of the EU.[181] However, arguments from Europe will not. For some politicians integrationist arguments are not important. For others there is political capital invested in an idea that Europe should go deep. They are in a difficult position.

At the moment, it is difficult to imagine such an anti-European step being initiated by the institutions themselves – Court or Commission. Perhaps it is significant that the Parliament, in its amendments to the services directive, simply chose to ensure that it did not apply to welfare. Positive protection of national borders was not pushed through.

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[178] Mossialos and McKee, n 8 above at 158-159.
[179] See Shaw and Aldridge 'Consumerism, Health and Social Order' (2003) 2 Social Policy and Society 35, at 39 interpreting changes in the NHS as a transfer of responsibility away from the state.
[180] On this plural vision see generally Johnson, *the Welfare State in Transition*, n 1 above
[181] See Offe 'The Democratic Welfare State' (2000) IHS Political Science Paper n 68; Scharpf 'The European Social Model' , n 143 above, at 649-651.

Moreover, if such a proposal was made, it would run into opposition of another kind. The number of individuals and institutions that are hoping to take part in cross-border welfare provision is increasing. For some Member States it may be a threat, but others already perceive it as, in the right areas, with limits, an opportunity. In the health care cases there were those who argued against a right to free movement, but others who intervened for the other side. There are states whose institutions would suffer from openness, but (some) German hospital organisations, British universities, and Dutch companies providing social insurance are examples of private bodies that already operate in a relatively commercial way, and stand to gain. These are large industries. Governments representing such interests will think twice before they agree to the principled exclusion of their companies from foreign markets. While no state welcomes EU interference in its own system, the political dynamic concerning a Europe-wide welfare exemption is much more complex and balanced.

Any such exclusionary rule would create a massive potential for abuse. A definition of welfare or social services, or a distinction between economic and non-economic services based on goal or character rather than organisation would encourage states and companies to portray ever-more activities as 'social', in order to benefit from the right to protectionism. Peripheral services such as transport, catering and maintenance would be integrated into welfare institutions rather than being contracted out, in order to avoid internal market law. This would not only extend the scope of the exemption and narrow the scope of free movement, but create economic distortions and inefficiencies. It would be particularly problematic if private or profit-making welfare institutions were also exempted, since they would then be free of competition constraints, and this would be likely to have an effect on companies in other, but related areas. Since the primary aim of any such exemption would be to protect public welfare institutions, it would therefore seem more logical to exclude only these from market law. However this is not so far from the law now; and as discussed above it is not the application of the law to these institutions directly which creates the problems, but the entry or exit of providers or clients. Yet if such rights were denied where public institutions are present, or dominant, then an inequality issue would arise. German patients would have free movement rights, while British would not. A right to run schools in the Netherlands would exist, but perhaps not in France. Such disparities are likely to be intolerable to many states, and conflict with the high value placed on uniform application of the law by the Court. In short there are good practical reasons why the law applies to all services provided for remuneration, their purpose or ownership notwithstanding, and it would require considerable ingenuity to find a coherent and applicable way to exclude welfare as such.

The easier path is to protect welfare at the stage of justification. Treaty free movement is the general rule, but each situation is considered to see whether other interests justify its restriction. This is the law as it stands, and it becomes clear why the Court developed it this way. There is little alternative.[182] Then extending the protection of national systems is to be done via increasing indulgence towards state arguments for restrictions. No doubt important steps could be taken in this way, but the difficulties have been discussed above, and suggest that closure of the welfare

[182] It is also attractive from a constitution-building point of view; it broadens the scope of the EU and involves it in a socio-economic constitutional dialogue. See the discussions of polyarchic deliberative democracy in Gerstenberg, n 105 above, and in Cohen and Sabel 'Sovereignty and Solidarity: EU and US' in Zeitlin and Trubeck (eds) *Governing Work and Welfare in a New Economy: European and American Experiments* (OUP, 2003).

state will not be achieved at the justificatory stage of analysis, particularly given that it is a self-supporting activity, in which openness supports more openness. Given that, even very small beginnings eventually become great changes. Leniency towards justifications is likely to slow more than prevent this process.

6. The Social Implications of Welfare Harmonisation: Welfare Patriotism and European National Identities

The rehabilitation of patriotism by welfare states

Many Europeans have regarded patriotism as problematic since the Second World War. In the abstract, it has seemed an emotion rendered illegitimate by such a powerful demonstration of its potential consequences. More concretely, it was difficult to believe that the nations producing such a war were deserving of it.

Still, it seems that the desire to feel good about one's state is strong,[183] for rather than abandon the attempt, there have been attempts to recast patriotism in a less ethnic, militaristic, and irrational form, most famously in terms of loyalty to a constitution containing widely accepted rights and principles.[184] Culture and heritage also play a prominent role in official versions of modern national worth.[185]

However, for many Europeans, certainly in the countries of the north-west of the continent, one of the greatest and most legitimate reasons for pride in their nation is its welfarist character.[186] The perception is widespread, and largely true, that nowhere else in the world has carried the welfare state to such heights, and nowhere else do citizens enjoy such a luxurious degree of protection from life's ills, and such an all encompassing guarantee of access to care, education, and a civilised minimum income.

There may be criticisms of the functioning of the welfare state, but the fundamental view of welfare services as akin to human rights, something to be available and enjoyed without regard to wealth or status, is ubiquitous, as is the view that it is the responsibility of the state to ensure that this equal and universal provision occurs.[187]

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[183] Miller 'In Defence of Nationality' (1993) 10 Journal of Applied Philosophy 3; Follesdal 'The Future Soul of Europe? Nationalism or Just Patriotism? A Critique of David Miller's Defence of Nationality' Arena Working Paper 00/7.

[184] Habermas, 'Citizenship and National Identity: Some Reflections on the Future of Europe'. (1992) 12 Praxis International 1; Rex 'National Identity in the Democratic Multi-Cultural State' (1996) Sociological Research Online 1:2, at ww.socresonline.org.uk; Serfaty 'Anti-Europeanism in America and Anti-Americanism in Europe' in Balis and Serfaty (eds) *Visions of America and Europe* (CSIS Press, 2004) at 3.

[185] Rex, ibid.

[186] Flockhart 'Critical Junctures and Social identity Theory: Explaining the Gap Between Danish Mass and Elite Attitudes to Europeanisation' (2005) 43 Journal of Common Market Studies 251; See also Irenius 'The New Social Patriotism' (2005) 6 Axess, www.axess.se.

[187] Kuhnle, 'Survival of the European Welfare State', Arena Working Paper 99/19; Habermas, letter to the Frankfurter Algemeine Zeitung, 31st May 2003, discussed in Garton Ash, *Free World* (Random House, 2004) at 47.

Partly this gives Europe identity.[188] Its generous welfare states are distinctive, and in a time when the fear of homogeneity is widespread[189] it enables talk of a 'European social model' or 'European values' or a 'European way of life'.[190] Solidarity may be to Europe what freedom is to the United States. Instead of pursuing happiness, Europeans collectively insure against events detrimental to it.

These ideas acquire great solidity and strong roots on society through the sheer size and scope of the state. It is ever present in the lives of most Europeans, and they have come to expect this. The institutions of welfare are shared by all and provide almost a language of public life.[191] Health, education and social security are discussed not only, not even greatly, in terms of the needs of human beings, but in terms of the maintenance of the system. A European politician is less likely to say that the state must provide good education to all, than that it must defend and build its educational system – and if challenged may retort that the two are equivalent. Citizens feel themselves to be, and are, inhabitants of a structure, and as such its walls and staircases become of great and common importance. Modern Europeans live within a state as much as they live within a nation, and sharing that state, and knowing that its existence depends on their collective participation, binds them to each other.

This is a source of security, but also of self-respect. The welfare state is something that helps Europeans feel good about themselves, and about their country, because it is one of those happy institutions that apparently combines self-interest with compassion for others. Some economists might argue that for the wealthy or healthy this is not so, because they subsidise others. However, most Europeans appear willing to trade some income for security. The need to be rich is less pressing if the risk and consequences of poverty are diminished.

There is a dark side. The risk of welfare tourism, and the view of immigrants as economically harmful parasites, has increased in prominence in recent years and become a new focus for nationalism, to some extent replacing more purely racist views, in public discourse at least.[192] The defence of the welfare state can provide on the one hand a cover for more traditional xenophobia, and on the other hand an ideological alternative to it, enabling a closed and fundamentally tribal identity to be maintained for those no longer able to accept more ethnically founded prejudice.[193] This nationalism-lite, in which politicians proclaim a formal non-racism,

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[188] Weiler 'A Constitution for Europe: Some Hard Choices' (2002) Journal of Common Market Studies 463; Rex, n 184 above. Delanty 'Beyond the Nation-State: National Identity and Citizenship in a Multicultural Society' (1996) Sociological Research Online 1:3 www.socresonline.org.uk.

[189] Berman *Anti-Americanism in Europe* (Hoover Institution Press, 2004)

[190] de Burca, introduction to de Burca, n 2 above; Marcusson et al, n 3 above; Habermas, letter to the FAZ, n 187 above. But c.f. Alesina, Glaeser and Sacerdote 'Why doesn't the US have a European-Style Welfare State?' (2000) Harvard Institute of Economic Research Discussion Paper no.1933 arguing that the differences result from race relations rather than different approaches to solidarity among the majority.

[191] See Dobkin Hall 'Philanthropy, the Welfare State and the Transformation of American Public and Private Institutions 1945-2000', (2000) Hauser Center for Non-Profit Organizations Working Paper no.5 referring to the privatization of welfare institutions as 'the end of public life as we have known it since the mid-19th century', at 38-39 (available on ssrn.com); Schnapper *The Community of Citizens* (Transaction Publishers, 1998) on the importance of shared institutions to civil life and discourse.

[192] Delanty, n 188 above.

[193] Ignatieff 'Nationalism and Toleration' in Caplan and Feffer (eds) *Europe's New Nationalism* (OUP, 1996); Rex, n 184 above.

while simultaneously pleading for policies which in practice seal and protect the indigenous majority, is increasingly popular,[194] and enables Europeans to pander to their desire for national community, while avoiding confrontation with the less savoury motivations for that desire. However, while xenophobia and solidarity may be subconsciously intertwined in most of us, at the conscious level, and in public reasoning, welfare is associated almost entirely with a kinder, more virtuous, and even inclusive state.[195]

In the wider world, this gives Europeans a sense of importance and value. If not the strongest or richest, they are able to believe in the moral worth of their communities, perhaps that Europe is the most good of places, the most human and progressive. Weakness relative to the United States – Europe's significant other[196] – can be recast as a choice for a difference philosophy of life, based around compassion rather than force.[197]

The welfare state has thus done much to rehabilitate patriotism in Europe. It offers a source of pride that seems to have none of the downsides of the old nation-love, no ethnic tarnish, no imperative to war, no justification for harsh or cruel government. On the other hand, it is more concrete and attractive to a non-specialist public than the constitutional abstractions offered by philosophers.

The cohesive value of shared institutions

Is this gentle new self-love threatened by a welfare market? It was taken as a premise that levels of provision can survive a liberalisation. A thousand competing hospitals or universities need not lead to exclusion or loss of quality. However, diversity and individual welfare autonomy may challenge some of the more subtle constituent elements of welfare patriotism, and of the nation. They do not dismantle welfare, but they dismantle the great monopolistic institutions that have traditionally provided it. These institutions may of and in themselves have a cohesive and nation-building function which is separable from the substantive services they provide.[198] A world where the same services are received from a multiplicity of private providers may feel significantly different.[199]

The passion felt by many in France for the great republican educational institutions, and by many in Britain for their National Health Service, which cannot be justified on quality-of-service grounds, at least insofar as it exceeds the emotions felt by their neighbours for their less institutionalised education or health systems, supports this. Yet it would be too simple only to focus on actual institutions – it is the feeling of institution that counts, and this can also be

[194] Delanty, n 188 above.
[195] On values and the welfare state see Schmidt 'Values and Discourse in the Politics of Adjustment' in Scharpf and Schmidt *Welfare and Work in an Open Economy* (OUP, 2000) at 229; Kuhnle, n 187 above.
[196] See Garton Ash, n 187 above, at 46-83; Diner *America in the Eyes of the Germans* (Markus Wiener Publishers, 1996) discussing the US as Europe's 'alter-ego', at 6.
[197] See Adorno *Critical Models: Interventions and Catchwords* (Columbia University Press, 1998) at 142-145; Kagan *Power and Weakness* (2002) 113 Policy Review; Bali and Serfaty *Visions of America and Europe* (CSIS Press, 2004).
[198] Clarke 'Welfare States as Nation States: Some Conceptual Reflections' (2005) 4 Social Policy and Society 407.
[199] Baldock, n 11 above, refers to the change in the 'material, cultural and ideological texture of community life', at 68. See also Dobkin Hall, n 191 above.

created by good regulation. Thus although their educational and health systems are largely privatised, and have been for years, the Dutch continue to feel as if there is a national system of which they are all a part, and multiple providers are bonded by careful regulation into what appears to the public as a coherent whole. Good, or tight, regulation can therefore fashion public institutions out of private components, and there is therefore no automatic decline in the sense of shared experience in a move to a regulated market.

However, there are many factors which make such a decline easy to allow, and hard to avoid. The actors in current regulated markets found in many states are almost state agents, and their freedom is so limited that their capacity to distinguish themselves from competitors is limited. Indeed, markets are often effectively allocated, whether through catchment areas for schools or hospitals or through compulsory affiliation to social insurance schemes. Even where there is choice, the behaviour of providers is so constrained that it rarely matters what one chooses.

Such tight uniformity is challenged by free movement. Foreign entrants will have different ways of doing things, and denying them that opportunity will be exclusionary, and require the state to defend itself, with all the difficulties discussed above. Moreover, there is likely to be, at least to some extent, a snowball effect. As markets become more diverse, the public will become aware that in fact there are different ways of running welfare institutions, and there are choices to be made. We may expect them, when offered a service that matches their personal philosophy, to fight for the right to receive it, and so assist in the fragmentation process. Because the attachment to institutions is not based on their superlative function, but their social bonding function, offers of new and apparently better services create a conflict of interest in the individual. As well as self-interest being a powerful factor there is also the game-theoretical point that citizens may not wish to be the fool – to remain loyal to trusted institutions if everyone else is going to abandon them anyway. Attachment to national bodies is consistent with an acceptance of services from their competitors.

Therefore the current situation, where quasi-national welfare institutions appear to exist even when provision is fragmented, may be expected to change, and for diversity and fragmentation to become much more apparent. This will be the basis of social change, as it becomes clear to citizens that they are not linked to the same institutions as their neighbours.[200] Although there may be minimum standards for the services that they all receive, there will inevitably be differences in how these standards are met, and there will also be the chance to exceed these standards, to buy more luxurious packages. The welfare experience will no longer be uniform, and much less will be shared. Throughout, the hand of the state will be less visible.

The result for the individual is likely to be a diminished sense of a link with one's neighbours, and ultimately with one's government – of isolation and alienation. There will also be a challenge to the sense of national equality, which in itself is a powerfully uniting idea. For society as a whole the changed experience of individuals may translate to reduced social

[200] See Kuhnle, n 187 above.

cohesion and a lesser interest in and respect for those outside one's immediate circle, and for public institutions.[201]

Education perhaps has the greatest cohesive force.[202] Consider, for example, that instead of offering free university education in state universities, a state offers to pay a certain amount towards university education, and allows individuals to choose where to spend it. One may expect that private and foreign institutions will soon enter the market.[203] Although it is not obvious that the level of education must inevitably decline, the collective bonding which comes from shared educational experience is lost, a fortiori if such an approach is used for schools. Standard syllabi, standard textbooks, standard teaching methods; in some countries it is even possible to know at any given moment precisely what page of what book is being studied by children of a given age, in schools throughout the land. The effect of this, and of losing it, should not be underestimated.

Diversity in health and social insurance reduces the awareness of a protective state. Requiring the individual to make personal choices which distinguish them from other welfare consumers is not just giving them freedom, but also moving onto their shoulders some of the responsibility for decision-making that the state used to bear. Initially at least, this will be experienced as abandonment as much as liberation.[204] When the Netherlands replaced its compulsory state sickness insurance with a competitive private-provider based system – with a basic minimum packet that must be offered to all without price variation between individuals – such emotions were apparent. Although the terms of medical care were largely unchanged, the feeling expressed in numerous newspaper articles and television discussions was of moving from a protective public system into the jaws of the market. Details strengthened this. Previously reimbursement of care providers was invariably direct from the insurer. Now sometimes the patient may receive a bill, and even though they can usually send that to their insurer rather than paying it directly, there is a widespread perception that the process has become more commercialised, with a consequent increased suspicion of the institutions involved. If they compete, can they be trusted? Americans will be more familiar with the idea that private providers can be forced to behave responsibly by making it in their own interests to do so – the threat of law suits or criminal punishment or loss of income if customers defect. Europeans presumably accept this in, for example, the context of airlines, where one hopes that the desire for profit does not reduce safety. Yet in the context of welfare services it is a relatively new idea to the continent. The idea that a provider has a personal financial interest in each service is still often seen as problematic.[205]

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[201] Habermas *The Post-National Constellation* (Polity Press, 2001); See also Murphy 'Between Facts, Norms and a Post-National Constellation: Habermas, Law and European Social Policy' (2005) 12 Journal of European Public Policy 143.

[202] De Swaan *In Care of the State* (Polity Press, 1988); Baliber *We, the People of Europe?* (Princeton University Press, 2004).

[203] See also Handoll 'Foreign Teachers and Public Education' in de Witte (ed) *The EC Law of Education* (Nomos, 1989), 31, on reactions to the foreign in Europe and the US.

[204] Clarke 'New Labour's Citizens: Activated, Empowered, Responsibilized, Abandoned?' (2005) 25 Critical Social Policy 447. See also Schwarz *The Paradox of Choice: Why More means Less* (Harper Collins, 2004), arguing that choice leads to depression.

[205] The ubiquity of no-profit requirements in the law relating to welfare may be seen as evidence of this. See *Sodemare*, n 42 above; Hofman, Hofman, Gray and Daly, n 5 above; Kenemade, n 7 above. It should however be noted that the non-profit organisation is also ubiquitous in the US.

The idea of equality is also threatened. 'Different but equal' is often seen as an attractive idea. However, equality of provision in a context of competition is somewhat disingenuous. Competition concedes the idea that some institutions may offer better services than others. The reality is that in a quantifiable context such as insurance, different is likely to mean better or worse. There will no longer be a uniform level of social protection. Moreover, even where terms are equal, the fact of provision through different institutions will mean that the complete experience is different. Upon unemployment or sickness one institution may be efficient and helpful, while another may not. Who knows which person on the street will turn out to have the best insurance, and the best protection? The question itself is new, as is having to compare the qualities of doctors, or universities. Uniformity of standard, even if not actual, has been until now widely perceived, and been widely comforting.

Equality, largely understood in a relatively formal sense, as uniformity, is a ubiquitous and central value in most European states. Equality of opportunity, or more substantive concepts, are still relatively strange.[206] It is the idea of identical treatment for each person, that the state is blind to who stands before it, that has a grip on public imagination. Partly this is a true equality ideal rendered practical – substantive equality is a notoriously difficult notion to use without controversy.[207] However it is also a preservation of the myth that all persons are the same, of a sense of homogeneity. This could be traced to the republican ideal, or to lingering ethnic identity, but its force is powerful in politics and public discourse.[208]

Uniformity does give the individual a sense of worth and security; they are no less than their neighbour. For those who cannot fit the mould, who need or want to be treated differently, it of course presents problems, and this is the intolerant side of Europe.[209] However, for those who can conform uniformity represents insurance against inferiority.

More attractively, great monolithic state structures, however Byzantine they may be internally, promote a sort of social transparency.[210] It would be optimistic to say that there is always transparency at the level of individual transactions, which may of course be frustrating and difficult, but there is a sort of conceptual simplicity; one goes to the relevant authority, presents one's problem, does as they say, and it will be dealt with. If it is dealt with badly, that's life; it's the same for everyone. Individuals may not know in detail how the welfare state works, but knowing that it is public and uniform provides a sense of place within it.

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[206] See Barrett 'The Concept and Principle of Equality in European Community Law' in Costello and Barry (eds) Equality in Diversity: The New Equality Directives (Irish Centre for European Law, 2003); Schwarze European Administrative Law (Sweet and Maxwell, 1992).

[207] Davies, *Nationality Discrimination in the European Internal Market*, n 80 above, chapter 4.

[208] Consider the debates over headscarves: See Beller 'The Headscarf Affair: The Conseil d'Etat on the Role of Religion and Culture in French Society', Texas International Law Journal (2004) p. 581; Jeremy Gunn 'Religious Freedom and Laïcité: A Comparison of the United States and France', Brigham Young University Law Review (2004) p. 419; Mahlmann 'Religious tolerance, Pluralist Society and the Neutrality of the State: The Federal Constitutional Court's Decision in the Headscarf Case', 4:11 German Law Journal (2003), p. 1099; Davies 'Banning the Jilbab: Reflections on Restricting Religious Clothing in the Light of the Court of Appeal in SB v Denbigh High School (2005) 1:3 European Constitutional Law Review 511-530.

[209] Ignatieff, n 193 above.

[210] See Baldock, n 11 above, at 67, on Foucault and shared understanding of institutions.

The core fear is that of being left alone. Europeans fear the isolation of individual choice. This has been a recurring theme in popular and newspaper discussions of welfare reform; we don't want to choose, we want to be secure. To put another gloss on the emotion; what do we pay the state for if not to make such tedious and complex decisions for us? Is the quality of life not better without these dull concerns? And yet in other contexts choice is embraced and accepted. There is no call in Europe for fewer types of car, state-run restaurants, or uniform clothing at work and school (religious issues aside).

The major risk is that the market makes Europeans feel abandoned and isolated and ultimately angry, and their desire to rediscover togetherness segues into nationalism.[211] If, on the other hand, the continent comes to accept welfare markets, then the social changes are also significant. Currently, European politics is dominated by a partial acceptance (and partial rejection) of the idea of the market as such. As a concept it stands in opposition to benign collective organisation, the structured, planned and wise society, which probably has at least as much, if not more, attraction as an ideal for most voters. But if one can accept a market for welfare, one can accept a market for almost any legitimate service.[212] If Europeans make the mental switch in this area, it indicates a sea change in the underlying political structure of the continent: the final letting go of Marxist economics.

Internally, the relationship with the state and with fellow citizens may be redefined. A more individualistic and self-reliant society may emerge,[213] but also one that is less trusting and less luxurious and where citizens must expend much more energy simply looking after themselves.[214] The focus of life moves closer to the practical. A significant risk associated with this is of loss of solidarity.[215] Where welfare experiences are not shared – in welfarist rather than universalist welfare states – support for redistribution is lower.[216] Do we care about what we do not share? The fragmentation of experience may lead Europe in this direction. Alternatively, it may be that the monopolisation of welfare by the state stifles other forms of solidarity, and freedom of provision will result in a flowering of diverse forms of community. It has been argued that social capital would be much greater without the monopolistic welfare state – although far from uncontroversially.[217] In any case, the liberalisation process may lead to a fundamentally different

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[211] Schnapper, n 191 above, suggests that civic institutions provide the only alternative to ethnic identity.
[212] Birchfield 'Jose Bove and the Globalisation Counter-Movement in France and Beyond: A Polanyian Interpretation' (2005) 31 Review of International Studies 581.
[213] De Swaan, n 202 above, at 254, regards the welfare state as the 'industrialisation' of conscience. See also Nesti (ed) *After the Militant, the Volunteer beyond the Secularization: European Identity, Welfare State, Religion(s)* (Milan, Angeli, 2002); Shaw and Aldridge, n 179 above.
[214] Deakin 'The "Capability" Concept and the Evolution of European Social Policy' in Dougan and Spaventa, n 9 above, discusses an analagous polarity in the context of reforming labour law.
[215] Offe, n 181 above, at 6.
[216] Scharpf 'The European Social Model', n 143 above, at 657.
[217] There is an abundant literature. See e.g. Roberts and Devine 'The Hollowing Out of the Welfare State and Social Capital' (2003) 2 Social Policy and Society 309; Kumlin and Rothstein 'Making and Breaking Social Capital – The Impact of Welfare State Institutions' (2005) 38 Comparative Political Studies 339; Putnam Bowling Alone: America's Declining Social Capital '1995) 6 Journal of Democracy 65; Arts, Halman, van Oorschot 'The Welfare State: Victim or Hero of the Piece?' in Arts, Hagenaars, Halman *The Cultural Diversity of European Unity* (Brill, 2003).

shaped society, where sub-communities such as the region and the church and the family take a greater role in care.[218]

Externally, relationships with the US, and with globalisation, are all potentially redefined. The politics of these is also built around market emotions and around difference. Europe has a long history of defining itself against the United States, and postulating a polarity of commercialisation versus civilisation.[219] The social model versus the market is a new incarnation of this old story. Yet if the social model is delivered via the market the difference becomes harder to sustain. Yes, there may be differences in the degree and scope of protection, but the sense of fundamentally different systems of government, and of values, must be reduced. This may ease hostility to the US. It may also be disturbing for Europe. There is little more comforting, and more conducive to ignoring one's one weaknesses, than dwelling on the perceived weaknesses of others.[220] Diminish the differences and you diminish the comfort, and make self-awareness harder to avoid.

7. The Policy Implications of Welfare Harmonisation: Unemployed States and Opportunities for the EU

When the major part of the activities of the state are reorganised, the ripples are likely to spread far. Here two suggestions are made concerning what are perhaps less obvious consequences of welfare change. One deals with the reaction of national governments, and one with that of the institutions of the EU.

The unemployed state

The type change brought about by the EU is from provision to regulation,[221] and the degree change is probably from highly confining to less confining regulation. Whether the second represents a decrease in employment for the state remains to be seen; a freer market may in some ways require closer supervision.[222] However the first change clearly means less state in the welfare state.

Perhaps more importantly than numbers of civil servants, the type of political involvement of government changes as it retreats from provision.[223] Currently the cost of welfare services is a pressing political issue in most European states, and certainly those of the north-west, where welfare is most generous. This has been the case for most of the last two decades, and in some

[218] Roberts and Devine, ibid.
[219] Adorno, n 197 above; Diner, n 196 above, describes the European image of America as 'the darker side of modernity', at 6; Woodward, in *The Old World's New World* (OUP, 1991) develops this theme in some detail at 35-60; Berman, n 189 above, describes the psychological aspects at 64-75.
[220] Adorno, ibid; Berman, ibid.
[221] Majone 'From the Positive to the Regulatory State: Causes and Consequences of Changes in the Mode of Governance' (1997) 17 Journal of Public Policy 139; Obinger, Liebried and Castles 'Bypasses to a Social Europe? Lessons from Federal Experience' (2005) 12 Journal of European Public Policy 545; Grimmeisen and Rothgang 'The Changing Role of the State in Europe's Health Care Systems', ESPA net conference paper, available online at www.apsoc.ox.ac.uk.
[222] See Keleman and Sibbitt 'The Globalization of American Law' (2004) 58 International Organization 103, on changes in regulatory style resulting from liberalization.
[223] See Lowi 'Four Systems of Policy, Politics, and Choice' (1972) 11 Public Administration Review 298.

countries for longer. One reason for this is that welfare is funded via taxes, or earmarked deductions from income and salary that are, for the payee, equivalent to taxes. Taxes are fixed by governments. The permanent problem of all governments in democracies is that the people want more for less.

In a more market-like welfare state we may expect a smaller proportion of funds to be channelled via the state in this way. More payments will be made directly to insurers or institutions, or between them. This changes the politics of costs, and of welfare. The first object of anger at decreasing services or rising costs may be the institution itself. The first reaction may be to change provider, rather than to change government (also changing provider in a sense). A provider who fails to balance their books, who cannot operate within the terms set by the regulatory state, will be forced to withdraw from the market, either through loss of customers or through bankruptcy. The costs of this will perhaps be ultimately born by the populace at large, but less visibly so than if the state must increase taxes or runs up a debt, which it would have to do; it cannot realistically go bankrupt. Thus many of the day-to-day issues of welfare cost and policy – teaching styles, teaching quality, healthcare quality, the way patients are treated, the range of treatments offered (outside a basic minimum), the small print of insurance policies – will be removed from centralised state decision making to decentralised decision-making by consumers. The government won't have to worry about these matters any more or, at least, as much as it used to.[224]

Welfare policy is insular. Increasingly, states look to their neighbours to learn policy lessons.[225] Nevertheless, it is essentially an engagement with the relationships within the borders of the state. What happens when a government has little to do at home? Perhaps the same as happens when it has problems at home that it cannot solve; it looks outside, for distraction. Starting a war to distract from economic problems is the most dramatic and archetypal example of this.

This is a speculative point, but it may be that the limited assertiveness in global affairs shown by European states is not just a result of innate pacifism nor only of weakness, but also because a government can define and occupy itself adequately without such engagement.[226] To go a step further, governmental resources must be limited in any state, and perhaps European states simply cannot engage adequately with the operation of a welfare state and have the policy energy over for a creative role elsewhere. This is not so much a point about finance as about the capacity to generate and manage policy, and the capacity of the public to absorb and assess and care about it. If so, we may expect that the institutional instinct to preserve its own necessity will encourage increasing governmental extroversion. Ministers and parliamentarians who cannot make a difference at home will ask the cameras to follow them as they seek to make a difference abroad.

To argue this convincingly would require specific empirical research. However, existing studies on related points suggest that the thesis is not ridiculous. It is, for example, accepted that foreign policy and national identity are linked, and domestically generated ideas of the role of the state

[224] Ibid.
[225] Zeitlin 'Social Europe and Experimentalist Governance: Towards a New Constitutional Compromise' in de Burca, n 2 above.
[226] C.f. Nicolaidis and Lacroix 'Order and Justice Beyond the Nation State: Europe's Competing Paradigms' in Foot, Gaddis and Hurrell (eds.) *Order and Justice in International Law* (OUP, 2003).

may have a powerful foreign policy influence.[227] Thus changes in domestic identity-creating institutions should have some external impact. It has also been argued that functional views of the organs of governance will tend to undermine taboos about sovereignty and lead to more interventionist foreign policy; if the state is just a means to an end then interfering in other people's states is easier to justify, particularly when those states function badly and we think we know how to make them work better.[228] Finally, it should be noted that a link between the institutional structure of welfare states and foreign aid policies has been established.[229] The structure of the welfare state certainly makes itself known abroad in some ways.

Opportunity for the EU

Markets require regulation and European markets require European regulation. As with telecoms and energy, the transfer of public services to the private sector results in a transfer of authority to Brussels. Assuming substantive welfare harmonisation remains taboo, it is nevertheless likely that competition-based regulation of providers will come into being. This is likely to accelerate and entrench the liberalisation of welfare, without determining the degree of protection that each state requires or guarantees.

Alongside this, the creation of welfare markets creates a new beast; the consumer of welfare services.[230] From being relatively passive recipients of public largesse, individuals move to taking significant control of the nature and origin of the services they receive. This opens up a particularly interesting avenue of opportunity for the EU, in the form of consumer protection law.[231]

There is already a considerable amount of EU consumer law, applying to purchase of goods and certain services.[232] The legal basis for this is the idea that shopping cross-border is obstructed by a fear of doing business in an unknown legal environment. Without a sense that basic consumer rights are protected, the consumer will stay at home. Hence minimum consumer protection standards throughout the EU, governing liability of suppliers and producers, guarantees on products, and unfair contract terms can be said to remove obstacles to movement and improve the operation of the internal market.[233]

It is accepted that certain kinds of transactions require specific legislation. For example, time share contracts and contracts made with canvassers who approach their customers in public places are both situations where the customer is vulnerable to enthusiastic persuasion, the

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[227] Aggestam 'Role Conceptions and the Politics of Identity in Foreign Policy' Arena Working paper 99/8; Barnett 'Institutions, Roles and Disorder: The Case of the Arab States System' (1993) 37 International Studies Quarterly at 278.
[228] Kingsbury 'Sovereignty and Inequality' (1998) 9 European Journal of International Law 599.
[229] Noel and Therien 'From Domestic to International Justice: The Welfare State and Foreign Aid' (1995) 49 International Organization 523.
[230] Baldock, n 11 above, describes the creation of welfare consumers as a post-hoc rationalization, 'an accidental consequence of the regulatory state', at 70.
[231] See Davies, 'Competition, Free Movement, and Consumers of Public Services' n 35 above; Palm 'Voluntary Health Insurance and EU Insurance Directives: Between Solidarity and the Market' in McKee, Mossialos and Baeten, n 26 above, at 195.
[232] See generally, Weatherill *EU Consumer Law and Policy* (Edward Elgar, 2006).
[233] See Weatherill, ibid; Davies 'Can Selling Arrangements be Harmonised?', n 159 above, for more.

contract may be more complex than at first seems, and there is a relatively high chance of regret. Targeted legislation addresses the problems that may arise.[234]

The creation of a cross-border welfare market cries out for consumer rights.[235] Firstly, the nature of the services involved is often intensely complex. Secondly, it is often difficult for the consumer to obtain full information about decisions made concerning them. Thirdly, there is a dramatic imbalance in expertise between provider and consumer, so that the consumer is often forced to, in economic terms, purchase whatever the provider tells them to purchase. Fourthly, these services matter. If it is important to protect purchasers of time share apartments, then how much more important it is to ensure that individuals are in a position to make wise decisions about their health care and education. Lastly, because of the importance and complexity of the services involved, there will be a significant inertia to shopping abroad or with a foreign provider operating domestically. Individuals will be disinclined to venture from known providers unless they feel safe doing so, and guaranteeing them certain minimum rights will be a significant step in achieving this.

The sorts of rights that legislation might guarantee include rights to information.[236] The patient should be able to know what is being done and why, and whether anything went wrong, and this information should be available immediately. That is not automatically the case in Europe, where explanation is often limited, and it is still relatively common practice for information to be withheld from patients 'in their own good'.[237] Perhaps they wouldn't understand, or it would only worry them, or since the mistake seemed to have no consequences the doctor sees no need to mention it. Does a patient have a right to be informed if the treatment they are receiving is not the best possible? In many states, where expensive treatments are restricted and second-best drugs routinely used without any admission to the patient of this, such a right would spread panic throughout the healthcare system.[238] Does the desire to prevent loss of faith in the state count for more than the individual's interest in knowing that, if they can find the money for it, or sue their insurer, there is a drug which might cure them? Doesn't Hippocrates have something to say about this? There are legitimate arguments for all the restrictive points of view above, but they nevertheless have an archaic feel. They require a degree of faith in professionals and a degree of subservience from their customers which is probably today regarded as obsolete.

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[234] E.g. Directive 94/47 (timeshare directive); Directive 85/577 (directive on contracts negotiated away from business premises); Weatherill, ibid.

[235] The services directive, currently proceeding towards enactment, [COM(2004)2 final]contains a section devoted to the informational rights of service recipients (chapter IV) which is essentially consumer protection. Had the directive applied to welfare services, as was originally intended, this would have been a step in the direction suggested in the text above. One may also note e.g. Communication from the Commission COM(2005) 115 'Healthier, safer, more confident citizens: A health and consumer protection strategy'.C.f. Nickless, n 106 above, arguing that the reasons in the text above are what transform us from consumers to patients, at 79-80. See also 'Data protection and health information privacy' in Hervey and McHale *Health Law and the European Union* (CUP, 2004) discussing what can also be seen as a form of consumer protection.

[236] See Radeideh *Fair Trading in EC Law: Information and Consumer Choice in the Internal Market* (Europa Law Publishing, 2005), on the right to information as an emerging general principle of Community law.

[237] See Leenan The Rights of Patients in Europe (Kluwer Law and Taxation, 1993) at 41-45. Generally see chapters 4, 8 and 9 on access to information, and protection and enforcement of rights in different Member States.

[238] See e.g. Bungay 'Cancer and Health Policy: The Postcode Lottery of Care' (2005) 39 Social Policy and Administration 144.

There are also good arguments for the availability of non-customer-specific information; what are the success rates of this school – for girls, for boys, for minorities - or surgeon or procedure? How many individuals have been helped back to work by this scheme? Once again, the general level of availability of such information is extremely low, particularly in the medical sphere.

Another issue is transparency.[239] As far as pension schemes go, incomprehensibility seems the rule rather than the exception; certainly this legally trained author has never been able to understand what he is paying or may get back. Similarly with most forms of social insurance, and much medical treatment, price transparency is low. This hinders movement. For example, most Dutch medical insurance currently pays out-of-system providers at up to the Dutch market rate. Apart from the difficulty of knowing what that is, there is the difficulty of knowing how to superimpose that template on a different treatment and price structure abroad.

Within education pricing may be simpler, but the rights of students are not clear. Much continental examining and marking is personal; the teacher both sets and marks the exam alone, without supervision. The result is dramatic differences in grading, such that the clever or cynical student can shop for high marks, and grades from different contexts, while formally and legally equivalent, are often not. There may be no easy solution to this, but are there rights of challenge or appeal? Mostly yes, but in widely differing ways and to differing degrees.[240] Does a student have a right to have their paper considered anonymously (almost unknown), if they feel that their name, betraying sex or origin, may influence the mark? Any such proposals to create a common body of rights of this type would be difficult to agree because of the wide differences in norms. It can also be said that in a market such rights should not be necessary – the whole point is that if they do not like what is offered they can go elsewhere. However, this is not the European way. There is a strong culture of fair and uniform protection, and the pattern is to regard differences in rights of this sort as sand in the market machinery, which must ultimately be removed. This view can also be justified by the desire that qualifications and education from institutions across Europe be seen as of equal value and level.

Two more issues are liability, and unfair contract terms, including terms restricting transferral between providers, likely to be an issue in social insurance, and to some extent in education, where the question of a legitimate minimum fee unit (the term, the year?) might be considered. The example of existing consumer legislation suggests that minimum European standards in such areas would require no new philosophy.

What is interesting about the possibility of such welfare consumer legislation is that it may not be as difficult to achieve as substantive harmonisation. It implies that national structures are left intact, and the individual is assisted in migration between them. The political obstacles may therefore be lower. Indeed a first step in this direction may be found in the new services directive, which includes a section on the rights of recipients of cross-border services.[241] Those rights are centred on issues of transparency and information, as suggested above. The idea of

[239] Jorens, n 104 above, argues that free movement could form the basis for Community standards increasing transparency, at 119.
[240] See Farrington 'A Study of Student-Institution Relationships in Selected States of the Council of Europe' (2000) 4 European Journal for Education Law and Policy 99.
[241] COM(2004)2 final, not yet enacted. See chapters III and IV.

protection for the consumer in the European services market is accepted, and a step towards specifically welfare-targeted legislation would seem an ideologically small one. Yet further thought suggests that perhaps it should be taken more seriously. The line between welfare services and the terms on which they are provided is not a clear one, and the result of consumer legislation may be harmonising effects on the services themselves.

From the side of the consumer, it is an artificial division. All the terms of the relationship between the parties are part of a single package. More importantly, from the side of the provider, while the distinction may make more sense, the two elements influence each other. Rights to transferability, information, and liability and contractual limitations, will influence the economics and marketability of particular types of service. One may expect providers to adapt their substantive offerings in the light of the terms on which they must offer them. Examples might include a wider range of treatments, if patients must be informed of all the possibilities, or a wider range of courses if students have the right to take credits at other institutions, or a narrowing of the range of social insurance possibilities in the light of the costs of transferral between providers. Thus if the EU becomes the market regulator of a welfare market this will entail a degree of indirect substantive welfare harmonisation.[242]

It will also bring the EU to the heart of national politics. This could have consequences for broader integration. If the liberalisation of welfare is seen as a failure, undermining social values, then the more closely it is associated with the EU, the greater the political backlash. If the Commission has become an assertive intervener in national markets, as is the case with energy or telecoms or, increasingly, financial services, ensuring cross-border competition, then the anti-European animosity aroused is likely to dwarf anything yet seen. There is nothing that arouses such passion in Europe as threatening societal security.

Yet if welfare levels survive liberalisation, and individuals become accustomed and even attached to their new freedom of choice, and accept the welfare market, then there is political capital to be earned from involvement. The EU, provider of consumer rights, may then be the protector of the individual in these important transactions, and just as it attracts significant political support for its interventions in other consumer areas, in non-discrimination, and in environmental regulation, it may come also to be seen as the friend of welfare rights for all. The potential political credit to be earned is probably as great as the downside risks are.

The EU has struggled for some time to find a path to the citizen's heart. It lacks cuddliness. It is valued in the areas mentioned above, but these are none of them central political issues. Welfare is. If welfare users felt the same way about the EU and the Commission as environmentalists, labour lawyers, or consumer groups do (not perfect, but a powerful force broadly in the right directions, and on the whole better than national governments), its position in the state-EU-citizen troika would truly be changed.

[242] See Bernard 'Between a Rock and a Soft Place: Internal Market versus Open Coordination in EU Social Welfare Law' in Dougan and Spaventa, n 9 above, at 273, on the line between rights and substance in the welfare context.

Popularity can be leveraged. Overcoming suspicion and attracting praise makes the next step in integration much easier.[243] Playing with welfare is playing with security and home affairs, with a common foreign policy, and with wider political integration too.

Long term harmonisation

In the longer term opportunities arise for substantive harmonisation. The market itself will achieve a form of this. As trans-European educational, healthcare and insurance providers come into being, it will be possible to have the same welfare services and protection in Poland and Cyprus as in Denmark. In the former countries they may be above the state-guaranteed minimum, and they may be only available to those who can afford them, but the removal of borders to cross-border welfare will at least make them available. It is not unlikely that many will choose to pay more to get more. In reality, therefore, the welfare services that individuals receive will become a great deal more similar across Europe, just as globalisation homogenises markets for more traditional products.

The more this happens, the easier it is politically to create EU legislation, and, in particular, the easier it gets for Member States to talk about substantive welfare on a European scale. Should there be common minimum standards for insurance, as there are for banks, for food, for many products? Now that mobility is already harmonising the substance of university education, should we begin to talk about what happens in schools?

Finally, negative harmonisation alone creates apparent economic imbalances. Institutions compete with each other under different regulatory frameworks, and as winners and losers emerge so do calls for substantive harmonisation. Whether justified or not, the perception of difference as unfairness creates a powerful lobby for a 'level playing field'. States opposed to harmonisation in a pre-movement period may find the political balance changes when cross-border services have actually begun undermining national institutions. Harmonisation once seen as a threat to national institutions may now seem to protect them. [244]

Thus the exuberant phase of liberalisation may be a transient one. Knocking down national walls may turn out in the long term to be less about creating a new market landscape than about preparing the ground for a new, albeit less substantial, European house. Free movement and competition may diminish the state's role in welfare only to see part of it reclaimed later by the EU.

Soft co-ordination assists this process. The trend of recent years has been to semi-formalise an ongoing conversation between states about policy matters, in the 'open method of co-ordination'.[245] This encourages them to learn from each other, and at least to some extent stimulates a process of natural convergence. Insofar as such convergence reduces the problems resulting from different systems the OMC can be seen as an alternative to positive

[243] De Swaan, n 202 above, on the historical use of welfare protection by central bodies to overcome the power of local elites.
[244] Davies 'Is Mutual Recognition an Alternative to Harmonisation?' n 101 above.
[245] On the OMC and welfare see Zeitlin, in De Burca, n 2 above; Scharpf, 'The European Social Model' n 143 above; Cohen and Sabel, n 182 above; Bernard, n 40 above.

harmonisation, and is likely to reduce the contexts where negative harmonisation occurs. It is a third way. However, it seems likely that reducing some differences will magnify the importance of remaining ones, and that ultimately a purely voluntary convergence will be regarded as too insecure by Member States and free movers whose rights and freedoms depend on a certain stable harmony between systems. Moreover, once convergence is significant the national uniqueness that was fought for becomes less apparent and motives to resist harmonisation are less. Hence the importance of the OMC in the longer term is likely to be as a preparation for positive harmonisation.[246] Given that, the extension of the OMC to welfare-related issues is an important step. Alongside that, it should be noted that national bureaucracies often have formal or less formal contacts with each other in an attempt to deal with the practical issues of free movement and avoid them becoming legal fights. This day-to-day peer learning and communication may not hit the academic headlines but it can be seen as a deepening and broadening of the OMC philosophy, and so likely to increase its effects.

8. The Economic Consequences of Welfare Harmonisation: An Emerging Global Industry

The United States is unique in the degree of its commitment to individual self-reliance, its social model, and its limited view of the state.[247] Most of the rest of the world is closer to Europe in its view of the ideal nation, and would tend to consider universal welfare services, with some degree of equality, a state priority. Many nations are not in a position to achieve this yet, but a growing number are, particularly in Asia and South America.

Health, education, and social insurance, if considered as industries, would dwarf all others. Healthcare alone typically consumes around 10% of a nation's GDP. [248]Social insurance can be even more. [249] Providing these services on a basis of universality and equality is likely to involve particular organisational and administrative expertise. Just as with any industry, possession of experience in an area is an export opportunity.

European providers should be in a position to market their organisational capacities around the world. They would not primarily be selling medical or educational skills, which are more widespread, but the creation of systems, mechanisms whereby all citizens can be included in welfare, and the necessary subsidy can be facilitated while keeping the financial role of the state to a minimum; attractive for countries developing new welfare states.

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[246] S.Velluti, The European Employment Strategy and Enlargement in T.Tridimas and P.Nebbia (eds), *European law for the twenty-first century - Rethinking the new legal order, volume1*, (Hart Publishing, 2004); D.Trubek and L.Trubek 'Hard and Soft Law in the Construction of Social Europe: the Role of the Open Method of Co-Ordination' (2005) 11:3 European Law Journal 343; D.Trubek, P.Cottrell, and M.Nance., "Soft law", "Hard Law", and European integration: Toward a theory of Hybridity, http://www.wisc.edu/wage/pubs/papers.

[247] Although one should not overstate the differences: See Marmor, Mashaw and Harvey *America's Misunderstood Welfare State* (Basic Books, 1992).

[248] Statistics are available at www.worldbank.com, http://hdr.undp.org, and www.oecd.org. EU Member States appear to spend (public spending only) around 5-7 % of GDP on education, around 7-9% of GDP on health, and around 15-30% of GDP on 'welfare' broadly interpreted. See also the figures in Ferrera, Hemerijck and Rhodes 'The Future of Social Europe: Recasting Work and Welfare in the New Economy', Report for the Portuguese presidency of the EU (2002).

[249] Ibid, and see also www.esip.org.

The providers would also be offering capital. Any welfare system must ultimately be self-financing, but will require initial funds to create the infrastructure. For the government of an emerging economy, wishing to extend welfare to its citizens while maintaining high growth such capital may be hard to come by. However unusual such a process may be historically it does not seem unlikely that partnership with a foreign firm who is able to cover or share costs – in return for sharing profits – would be an attractive option. Providers who occupy a significant part of the European market for welfare would be very large organisations, capable of raising considerable amounts of money. They would be in a position to significantly assist welfare growth elsewhere in the world.

Education is likely to be the most resisted market. [250] States will not welcome interference in this sensitive element of national composition. However, at the higher technical level this may not be so; the provision of technical training institutions can be seen as an extension of the co-operation and partnership between western and other establishments which is already widespread. Health care may be the easiest to enter. It is often the most commercial aspect of welfare. A smart government may welcome foreign healthcare providers on condition that they build their infrastructure not only in the rich cities but also in the countryside, and that they provide services on equitable terms.[251]

Ultimately it is social insurance which holds a welfare state together,[252] and which is potentially the biggest market of all. The capacity of individuals to obtain other services can be guaranteed by providing them with insurance, and a state could once again welcome deep-pocketed foreign insurance organisations but insist that they offer on terms of universality – as is the case in Europe, and as European providers will know how to do profitably.

Relatively little of the above is happening, partly because the welfare providers are not outward looking. Their goals and vision are internal to their home states. The actors barely exist, in Europe at least, who are interested in spreading their skills as far as possible and conquering new markets. Yet there are signs of change. The universities are the avante-garde here, with an increasing number of western, predominantly American but also European, ones opening campuses in Asia.[253] There are also foreign-run hospitals, and Asian non-welfare insurance markets are increasingly being targeted by foreign insurers.[254] The important step will come when medical and long-term sickness insurance are added to the list. Then the release of welfare from national boundaries may echo beyond the EU, and whatever strength is gained and lessons are learned from cross-border European provision may gain its greatest significance as a preparation for the spread of welfare round the globe.

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[250] See Handoll, n 203 above; Moschonos, n 1 above.
[251] On the issues see Drechsler and Jutting 'Private Health Insurance for the Poor in Developing Countries'(OECD development centre, Policy Insights no.11, 2005), available from www.oecd.org; Bennett McPake and Mills (eds) *Private Health Providers in Developing Countries: Serving the Public Interest?* (Zed Book,s 1997); Leonard *Africa's Changing Markets for Health and Veterinary Services, the New Institutional Issues* (Macmillan, 2000); Vogel *Financing Health Care in Sub-Saharan Africa* (Greenwood Press, 1993); Newbrander *Private Health Sector Growth in Asia* (Wiley, 1997); Wieners (ed) *Global Health Care Markets* (Jossey-Bass, 2001).
[252] See Newbrander, ibid, at 21.
[253] See Ho Mok 'Privatization or Marketization: Educational Development in Post-Mao China' (1997) 43 International Review of Education 547.
[254] Chu 'The Making of Imminent Insurance Markets in Asia' Best's Review, April 2001.

9. Conclusions

It's not about levels of welfare. States can still regulate and use taxation to ensure universal coverage. It's about institutions and borders. Provision is being fragmented and de-nationalised. It remains to see how far this will go, but the trend is for Member States to encourage the process by themselves stimulating more diversity and freedom of provision, and so creating a proto-market which EU law then takes further. Looking at the law as it stands, its consistency, and its roots in principles without which the EU becomes meaningless, it seems likely that a significant deconstruction of welfare monoliths will take place.

Is this move, which can be broadly described as from provision to regulation, a socially neutral one? After all, it is being done primarily in an economic cause, with derogations serving to protect social aims. That would suggest that there is no aim to transform society, but rather to preserve it while transforming economic structures.

One challenge is to equality. Universality is relatively easy to achieve, but maintaining equality of welfare services in a borderless market will demand a lot from regulators. They will need to make a commitment to an ongoing management of markets which recognises the virtues of allowing liberty of provision, but is not afraid to steer and constrain it in the name of other goals. EU law allows exceptions to market principles, and states will have to meet the challenge of arguing their case well instead of flaunting national choices as if these were the last word, and so inviting judicial rebuke. The corporate welfare states of Northern Europe have islands of surprising competitiveness already, and indicate that some kind of balance is possible. They achieve this by an intense democratic and consultative process, and are able to maintain it because of widespread public support for precisely that idea of balance between public and private, individual and collective.

Creating such a balance demands a more complete social vision than running a state monopoly does. Instead of imposing uniformity, a simple but lumpen form of fairness, states have to think what services and support are necessary to enable all individuals to actively participate in a diverse society, and negotiate the choices it presents them with. Rather than achieving equality by controlling delivery of the end-goods, the objects of state policy become the consumers of the goods, and the responsibility of the state is to mould them so that they are able to make their own way, with a sufficient absence of failure that one can still speak of an equal or fair society. The state in a welfare market may be institutionally less present, but its demands and constraints may become – paradoxically? - more intrusive.[255] Is this a distant echo of the United States, where a famously free and comprehensive market is combined with strict and moralistic laws? Freedom entails responsibility – or it contains its own limits.

The broader challenge is to national identity. Can there be culture, in the sense of a shared way of life, without institutions? Law is an impoverished replacement as a binding factor. It has no hinterland, and offers no place for contribution or participation, for exchange between citizens. To share norms may have some value, but is about common limits, rather than common activities. It is participating in common institutions which creates a sense of shared life.

[255] Shaw and Aldridge, n 179 above, at 39; See also Kingsbury, n 228 above.

If culture is to survive it will then take place increasingly outside the state. In locality, religion, politics, ideology, profession, income, people will look for a sense of community and shared experience. Such a decentralisation and diversification may bring with it a great deal of vibrancy and creativity, but is there anything left over that one could call the nation-state, beyond a skeleton of emergency services, policing and war-making – functions that take place around and between the fabric of daily existence, whose very aim is to provide a bubble within which that existence can continue undisturbed?

To many Europeans such a fragmentation and Americanisation of their lives will be an alarming prospect. It can also be seen as a confrontation with reality – if the sense of belonging to Europe and its nations is no more than a governmental construct then should we care about losing it? Isn't there a widespread belief that there is some deeper fund of shared values, attitudes, attachments, sentiments, which defines and binds us? Are we going to find out that this is a myth, or something so shallow and fragile that it dissolves under the homogenising power of liberty? Is the enemy then the liberty, or the dishonest belief in our special-ness which a lack of the chance to be otherwise has allowed to survive?

Perhaps the most authentically European aspect of this situation is the combination of beliefs: one the one hand, that Europe has some deep attachment to solidarity, some way of life and collective morality which is both good and distinctive, and on the other hand, a sense of how delicate such things are, how they can be simultaneously valued by the population and destroyed in a moment by institutional or social change. Is there a contradiction here, some self-deception about the depth of the values, or is political and social maturity a better description? Is it precisely a sense of the selfishness and weakness of individuals that makes them care about systems to overcome these evils? This is not the state as an, American-style, reflection of the people, but the state as a necessary counterpoint to them. It does not see human beings as fundamentally good, but as fundamentally complicated.

Liberalising welfare will be revealing. It is easy to imagine that accustomed to choice and independence we may become more resentful of subsidising others. Knowing that a few thousand more euros would buy a place at that top college may test our preparedness to pay towards the college education of others. Accustomed to medical treatment in an attractive centre with People Like Us, we may come to feel much less responsibility for what happens in the other hospital on the other side of town. Knowing that our employer has arranged a pension exceeding minimum standards and has provided us with certain contractual guarantees, may make the question of what those minimum standards should be somewhat less pressing. If we receive the same and standard service as the state defines and provides for all, then our interest in making it a good one is far more direct. Will the political will to a 'social' state survive the loss of uniformity?

It is the first time that Europe has had to face these questions. It built up its welfare states in a situation of authentic crisis. On the continent the risk of chaos and truly devastating poverty was close, while in the UK there was a need to integrate and neutralise the social threat presented by potentially unemployed and traumatised returning soldiers. By the time the crisis was over, the welfare state had become taboo, not just in broad principle but in its institutions. No politician

dared to tamper with the structures that had been safety nets for millions. For voters, passionate support for these institutions was hardly surprising while no alternatives were available. No-one burns their clothes until they have a new suit. The consequence is that the European belief in solidarity is hardly tested. The present welfare state is a gift from history, more than a conscious choice by the Europeans of today.

I tend to think that this is the most interesting and important aspect of welfare reform. In a continent not without sanctimony, it provides us with a chance at self-discovery. Do we really care about each other as much as we like to say? People make institutions, but institutions also make people, and remaking those institutions may reveal how many of our values are really rooted in something more permanent and psychologically deeper than the activities of government. Has our history taught us a social conscience so well that we cannot forget it, or have we just not had the chance at that forgetting? There is on the one hand the fear proclaimed in the newspapers, the parliaments, and the demonstrations, that the market will conquer our principles, and ravish our systems. There is on the other hand the unexpressed fear that lives between the lines, the deeper one; that we will surrender them willingly. Are we, the people of Europe, truly the possessors of some defining instinct to solidarity or, once released from compulsion, will we turn out no different in behaviour and values from those to whom we like to compare ourselves? Are we, to use the language of Europe's panic, Americans?